

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 139

JOSEPH ESTIN, PETITIONER,

vs.

GERTRUDE ESTIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, SECOND DEPARTMENT**

GERTRUDE ESTIN, Plaintiff-Respondent-Appellant,
against

JOSEPH ESTIN, Defendant-Appellant-Respondent

STATEMENT UNDER RULE 234

This is an appeal from an order and judgment entered in the office of the Clerk of the County of Queens on July 9th, 1946, as resettled on August 12th, 1946. A motion was made by the Plaintiff-Respondent upon an order to show cause dated the 20th day of February, 1946, for an order directing that judgment be entered against the Defendant-Appellant for accrued and unpaid alimony under the judgment entered in the office of the Clerk of Queens County on the 14th day of October, 1943, and for a counsel fee. The Defendant-Appellant moved by affidavit and notice of motion, returnable the 3rd day of April, 1946, for an order amending the aforementioned judgment herein by striking therefrom all provisions for the payment of money by the Defendant-Appellant to the Plaintiff-Respondent for her support and maintenance. Both motions were heard and decided simultaneously.

The Plaintiff-Respondent appeared by Roy Guthman, Esq.

The Defendant-Appellant appeared by Wing & Wing, Esqs.

[fol. 2] There has been no change of parties to the action.

The Plaintiff-Respondent now appearing by Roy Guthman, Esq., formerly appeared in the action by Edward C. Morsch, Esq., and the Defendant-Appellant now appearing by Wing & Wing, Esqs., formerly appeared by Mitchell Salem Fisher, Esq.

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

NOTICE OF APPEAL BY DEFENDANT

SIRS:

Please Take Notice that the defendant hereby appeals to the Appellate Division of the Supreme Court for the Second Judicial Department from the Order herein as resettled by the Order of this Court dated August 12th, 1946, denying the motion of the defendant to modify a Judgment of Separation herein, and granting the motion of the plaintiff for Judgment for purported arrears of alimony in the sum of [fol. 3] \$2,441.90, which said Judgment was entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946, and that the defendant appeals from each and every part of said Order and Judgment.

Dated: New York, N. Y., August 21, 1946.

Yours, etc., Wing & Wing, Attorneys for Defendant,
Office & P. O. Address, 225 Broadway, Borough of
Manhattan, City of New York.

To Roy Guthman, Esq., Attorney for Plaintiff, Office &
P. O. Address, 11 West 42nd Street, Borough of Manhattan,
City of New York, Clerk of the County of Queens.

[fol. 4] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

NOTICE OF APPEAL BY PLAINTIFF

SIRS:

Please take notice that the above named plaintiff, Gertrude Estin, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from so much and such part of the order and judgment of this Court herein, as re-settled by the order of this Court dated August 12th, 1946, denying the motion of the defendant to modify a Judgment of separation herein,

and granting the motion of the plaintiff for Judgment for arrears in the payment of her support and maintenance in the sum of \$2441.90, which said Order and Judgment was entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946; as finds, and adjudges,

(a) That the Second Judicial Court of the State of Nevada in and for the County of Washoe, had jurisdiction on May 24th, 1944, or at any other time, to render a judgment of divorce in favor of the defendant herein, Joseph Estin, and against the plaintiff herein, Gertrude Estin, and finds and adjudges that said divorce obtained by the husband in Nevada was jurisdictionally efficacious to dissolve the marital status of the parties.

(b) As fails to find and adjudge that the judgment of the Supreme Court of the State of New York, Queens County, [fol. 5] entered herein on October 13th, 1943, which grants to the plaintiff a separation and an allowance of \$180 per month for her support and maintenance is a final judgment and is entitled to full faith and credit in all of the Courts of the State of New York and is not subject to collateral attack and that therefore defendant's motion herein to modify said judgment of separation should have been dismissed for that reason:

And from such parts only, and the plaintiff does not appeal from any other part of said judgment.

Dated, New York, N. Y., August 29, 1946.

Yours, etc., Roy Guthman, Attorney for Plaintiff,
Office & P. O. Address, No. 11 West 42nd Street,
New York 18, N. Y.

To the Clerk of the County of Queens, Messrs. Wing & Wing, Attorneys for Defendant, 225 Broadway, New York 7, N. Y.

[fol. 6] At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Queens, at the General Court House, in Sutphin Boulevard, Jamaica, Queens County, on the 12th day of August, 1946.

Present: Hon. James T. Hallinan, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

RE-SETTLED ORDER AND JUDGMENT APPEALED FROM

Upon reading and filing the annexed stipulation, dated July 18, 1946, signed by the attorneys for the parties hereto, and the Affidavit of James G. Purdy, sworn to July 24th, 1946, it is

Ordered that the Order and Judgment of this Court, dated the 2nd day of July, 1946, and entered in the office of the Clerk of the County of Queens on the 9th day of July, 1946, is hereby resettled to read as follows:

[fol. 7] At a Special Term, Part I, of the Supreme Court of the State of New York held in and for the County of Queens at the General Court House in Sutphin Boulevard, Jamaica, Queens County, on the 2nd day of July, 1946.

Present: Hon. James T. Hallinan, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

A Judgment having been duly made and entered herein on the 11th day of October, 1943, directing among other things, the payment by defendant to plaintiff of the sum of One Hundred and Eighty (\$180.00) Dollars per month for her support and maintenance and it appearing that the said defendant has made default in the payment of the sums of money required to be paid by the said judgment and the plaintiff having made application for an order directing the entry of a judgment for the amount of such

arrears, with interest, together with an application for an additional reasonable allowance of counsel fees to defray the expense of collecting any judgment for arrears of payments of support and maintenance, to pay plaintiff's counsel for services in preparing the Order to Show Cause, affidavits and exhibits attached thereto and for the argument [fol. 8] of same in Court; and an order having been granted on the 20th day of February, 1946, in this Court, requiring the defendant to show cause why such relief should not be granted, and having been returned with proof of due service thereof, and on reading and filing the affidavit of Gertrude Estin, verified the 16th day of February, 1946, and the Exhibits A, B, B1, B2 and C thereto annexed and upon reading the judgment roll in the above entitled action heretofore filed herein, and upon reading all the proceedings and papers heretofore had and filed herein, the Order to Show Cause and the proof of service thereof; in support of said application; and the affidavit of George S. Wing, one of the attorneys for the defendant herein, verified March 29th, 1946, and the affidavit of Joseph Estin verified March 19th, 1946; and the copy of the affidavit of Lloyd V. Smith verified March 19th, 1946; the affidavit of Marjorie De Val verified March 1st, 1946; and Exhibits 1, 1A, 2, 3, 4, 5, 6, 7, 8, 9 and 10 attached to said affidavits, on behalf of the defendant, in opposition to said application; and the defendant by his attorneys Wing and Wing, having served on the plaintiff herein on the 26th day of March, 1946, a Notice of Motion herein for an Order amending the Judgment herein by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance and for such other and further relief as may be just and proper, returnable on April 3rd, 1946, at the same time as the aforesaid Order to Show Cause herein is made returnable and after reading [fol. 9] and filing said Notice of Motion by the defendant and the affidavit of Joseph Estin verified March 19th, 1946; the affidavit of Lloyd V. Smith verified March 19th, 1946; the affidavit of Marjorie De Val verified March 1st, 1946; the affidavit of George S. Wing verified March 25th, 1946, together with Exhibits 1, 1A, 2, 3, 4, 5, 6, 7, 8, 9 and 10 attached to the said affidavits on behalf of the defendant, in support of the motion and on reading and filing the affidavit of Gertrude Estin verified April 12th, 1946, and the

affidavit of Gertrude Estin also verified on the 12th day of April, 1946, and the affidavit of Roy Guthman, verified April 12th, 1946, in opposition to the said motion of the defendant, and after reading and filing the affidavit of James G. Purdy verified April 16th, 1946, in support of said motion and in reply to the said affidavits of Gertrude Estin verified April 12th, 1946, as aforesaid.

And the said Order to Show Cause on behalf of the plaintiff and the said motion on behalf of the defendant having come on to be heard before me in Special Term, Part I, of this Court on the 17th day of April, 1946, and after hearing Roy Guthman, Esq., of Counsel, for the plaintiff in support of said Order to Show Cause and in opposition to said motion on behalf of the defendant and James G. Purdy, Esq., of Counsel for the defendant in opposition to said Order to Show Cause and in support of the said Motion on behalf of the defendant and due deliberation having been had, and after filing the opinion of the Court, now on Motion of Roy Guthman, Esq., attorney for the plaintiff, it is

[fol. 10] Ordered that the motion on behalf of the plaintiff be and it is hereby granted, and it is further

Ordered that this order be entered as a judgment in the office of the Clerk of the County of Queens, State of New York, for the amount of arrears, to wit, the sum of \$2,340, being the arrears for thirteen months at \$180.00 per month from May, 1945, to and including June, 1946, together with interest thereon at 6% to the date of this order amounting to \$81.90, that is, for the total amount of \$2,421.90, together with Ten Dollars (\$10.00) costs and disbursements, and it is further

Ordered that the motion on behalf of the defendant to modify the judgment of separation rendered by this Court so as to eliminate the provisions therein for the plaintiff's support is in all respects denied together with Ten Dollars (\$10.00) motion costs and disbursements to the plaintiff, and it is further

Ordered that the plaintiff be and hereby is allowed a counsel fee in connection with these proceedings in the sum of \$250.00 payable in ten (10) days after service of a copy of this order on defendant's attorneys, and that judgment be entered herein for Two Thousand Four Hundred Forty

[fol. 11] One and 90/100 (\$2,441.90) Dollars, and the plaintiff have Execution therefor.

Enter

James T. Hallinan, J. S. C.

Granted July 2, 1946. Paul Livoti, Clerk.

Order entered July 9th, 1946 at 9:50 A. M. Paul Livoti, Clerk.

Enter.

James T. Hallinan, J. S. C.

Granted Aug. 12, 1946. Paul Livoti, Clerk.

[fol. 12] At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Queens at the General Court House of Queens County, on Sutphin Boulevard in Jamaica, New York, on the 20th day of February, 1946.

Present: Hon. Henry G. Wenzel, Jr., Justice.

[Same Title]

ORDER TO SHOW CAUSE

On the affidavit of Gertrude Estin, verified on the 16th day of February, 1946, and upon the judgment of this Court entered on the 14th day of October, 1943, herein and upon all the papers and proceedings heretofore filed and had herein,

Let, Joseph Estin, the defendant above named, show cause before this Court, at a Special Term, Part I thereof, to be held in and for the County of Queens, at the General Court House in Jamaica, Queens Borough, New York City, on the 15th day of March, 1946, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made directing the entry of judgment for the amount of \$1,620.00 arrears in the payment of the sums of money with interest required to be paid by the defendant above named under the judgment of this Court made and entered on the 11th day of October, 1943, and why the plaintiff should not have an additional allowance for counsel fees, and why the plaintiff should not have

[fol. 13] such other and further relief as to the Court may seem just and proper together with the costs of this order to show cause.

Let the defendant or his attorney serve copies of the answering affidavits on the plaintiff's attorney five days before the return day of this Order to Show Cause.

Sufficient cause appearing therefor, let service of this order and the affidavit upon which it is granted, upon the defendant by delivering true copies thereof upon Mitchell Salem Fisher, Esq., attorney of record for the defendant herein and attorney in fact for the defendant, for the purpose of receiving service of process and other notice in connection with this above entitled cause of action, under contract dated March 16th, 1943, between the above named plaintiff; the defendant; the said Mitchell Salem Fisher, Esq., and Edwin C. Morsch, Esq.; on or before the 28th day of February, 1946, be considered sufficient service.

Enter.

H. G. W., Jr., J. S. C.

Granted Feb. 21, 1946. Paul Livoti, Clerk.

[fol. 14] IN SUPREME COURT OF NEW YORK

County of Queens

[Same Title]

AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO FEBRUARY 16, 1946,
READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:

GERTRUDE ESTIN, being duly sworn, deposes and says:

1. That she is the plaintiff in the above entitled action.
2. That on the 11th day of October, 1943, a judgment was duly made and entered in this Court in which and by which it was provided among other things, that the defendant pay to the plaintiff the sum of One Hundred and Eighty (\$180.00) Dollars per month for her support. A true copy of said judgment is hereto annexed and made a part of this affidavit, Exhibit A.

3. That as will appear from the affidavit of Jacques J. Benjamin, verified the 27th day of October, 1943, and hereto annexed a certified copy of the said judgment was personally served upon Joseph Estin, the Defendant at 319 E. 50th Street, Manhattan, New York City, on the 27th day of October, 1943.

4. That the said defendant has made default in paying the sums of money as required by the said judgment, directing the payment thereof as aforesaid and has failed to pay [fol. 15] the sum of \$180.00 required to be paid on the fifth days of the months of June, July, August, September, October, November and December, of the year 1945 and the months of January and February, 1946, leaving the amount of Sixteen Hundred and Twenty (\$1,620.00) Dollars due at the date of this affidavit.

5. That the defendant paid to the plaintiff the amount of \$180.00 per month regularly until January, 1944, when the defendant through his attorney herein, Mitchell Salem Fischer, Esq., informed the plaintiff that the defendant did not intend to pay to the plaintiff any more alimony under the judgment of this Court entered herein on October 11, 1943; that thereafter the plaintiff collected the monthly payments of alimony of \$180.00 per month, from a fund of \$1,250.00 established by a written contract entered into on or about March 16th, 1943, by and between the plaintiff and the defendant and their respective attorneys herein, a copy of which contract is hereto annexed marked Exhibit B; that the plaintiff collected the amount of \$180.00 per month from such fund for each month up to and including July, 1944, when she collected the amount of \$170.00 and exhausted the fund. That on or about January 12th, 1945, the deponent, plaintiff in this action, procured an order to show cause of this Court, signed by Mr. Justice Peter Daly, requiring the defendant or his attorney, Mitchell Salem Fisher, Esq., to show cause why a money judgment for \$910.00, arrears of alimony, should not be entered herein and that on or about [fol. 16] January 25th, 1945, and upon the argument of said order to show cause the defendant, through his said attorney, paid the amount of \$910.00, with interest; that on or about March 15th, 1945, and March 23rd, 1945, the deponent, plaintiff, procured another order to show cause herein why a money judgment should not be entered herein against the defendant for the sum of \$720.00, arrears of alimony, together with an additional allowance of counsel

fees; that on April 9th, 1945, and before the return day of said order to show cause the defendant, through his attorney, Mitchell Salem Fisher, Esq., paid to the plaintiff the sum of \$820.00, the said amount of \$720.00 arrears of alimony plus \$100.00 an agreed amount by defendant for additional counsel fees.

Deponent further says that by said contract entered into by the plaintiff and defendant and their respective attorneys on March 16, 1943, Exhibit B (and by contracts dated April 1, 1943, and April 17, 1943, Exhibits B' and B'' all executed by the same parties, modifying and confirming the first contract dated March 16, 1943, as to the depository of the said fund of \$1,250.00) the defendant designates his attorney Mitchell Salem Fisher, Esq., as his agent to receive service of process or notice of any kind whenever it is necessary to enforce any right of the plaintiff under the judgment of this Court. That by letter dated April 3rd, 1944, Exhibit C, mailed to the plaintiff's attorney by the defendant's attorney, the defendant sought to revoke the said power of attorney under said contract to receive process [fol. 17] and notice for him in this case; that the plaintiff is informed and verily believes, that, as appears from said contracts, Exhibits B, B' and B'' that the plaintiff has a material and valuable interest in said contracts, that the same were entered into to protect the plaintiff as to the collection of any award of alimony which would be granted her by this Court, that the power of attorney contained in said contracts designating the said Mitchell Salem Fisher, Esq., as agent for the defendant to receive service of process and notice herein, is a power of attorney coupled with an interest and is therefore irrevocable; that the notice mailed by the defendant's attorney purporting to revoke said power was mailed a few days after the said attorney had informed the plaintiff, as aforesaid, that the defendant did not intend to make any further payments of alimony under the judgment and decree of this Court and was done for the purpose of hindering and delaying and impeding the plaintiff in the collection of her alimony herein.

Deponent further says that she will be put to great expense to procure and enter a money judgment herein, to procure an exemplified copy of such judgment, under the act of Congress, and to send such exemplified copy of such judgment to the Western State where defendant is now residing and to collect the amount of such judgment; plaintiff is informed and believes that the fee she will be required

to pay for collecting such judgment will be at least twenty-five (25%) per cent of the sum of money collected, which [fol. 18] does not include the amount she will have to pay to her counsel for preparing this order to show cause and voluminous affidavits and exhibits, for the argument of same and the necessary counsel work in connection therewith; that plaintiff believes that \$750.00 is a fair and reasonable amount of counsel fees which she will be required to pay; that the amount she mentions and asks for is for services in connection with present order to show cause and services necessarily to be incurred in collecting any judgment rendered, and not for any past services, or to reimburse her for any counsel fees heretofore paid out by her; that, upon reliable information and belief the defendant is well able to pay the amount of arrears of payments of maintenance of plaintiff required to be paid by him by the judgment of this Court entered herein on October 11th, 1943, together with the amount of additional counsel fees asked for; that defendant left New York in or about November, 1943, with \$150,000.00 which he realized from the sale of his interest in the Eastern Castings Corporation of 542 West 27th Street, Manhattan, New York City, and including several thousand dollars of bonds which defendant then owned; that the source of plaintiff's information is a confidential report which she had made by and secured from Proudfoot's Commercial Agency, 70 Pine Street, Manhattan, New York City; that the defendant, through his attorney, admits that he secured \$50,000.00 for his share of the said Eastern Castings Corporation at the time or just before he left New [fol. 19] York City; that by the payment of \$100.00 as counsel fees by the defendant through his attorney on April 9th, 1945, as aforesaid, before the argument of an order to show cause, the defendant and his attorney admit and show that they recognize the justice and propriety of plaintiff's demand for additional counsel fees.

Deponent further says, upon information and belief, that the defendant, Joseph Estin, has removed from the State of New York and is now in California or Nevada.

6. That no previous application has been made for the relief sought herein.

7. That an order to show cause is asked for herein by reason of the fact that Section 1171b of the Civil Practice Act requires that this application be upon such notice to the defendant as the Court may direct, and defendant is

desirous that the Court shall make such direction by means of any order to show cause.

8. That the plaintiff, applicant herein, asks that the defendant by his attorney be required to serve copies of his answering affidavits, intended to be used in opposition to this order to show cause, upon the plaintiff's attorney five days before the return day of this order to show cause and for that reason asks that the order to show cause be made returnable fifteen or more days from its date.

(Sworn to by Gertrude Estin, Feb. 16, 1946.)

[fol. 20] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

Index No. M 712. Year 1943.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Queens, at the Court House, Jamaica, County of Queens, State of New York, on the 11th day of October, 1943.

Present: Hon. Peter M. Daly, Justice.

GERTRUDE ESTIN, Plaintiff,
against

JOSEPH ESTIN, Defendant

This action having been duly brought on for a judgment of separation because of the wilful abandonment of the plaintiff by the defendant, and the summons and certified complaint having been duly served on the defendant personally within the State of New York, and twenty days having elapsed since the said service, and the defendant having appeared by Mitchell Salem Fisher, as attorney, and not having answered although his time to do so has fully expired and has not been extended by the court or otherwise, and the plaintiff having applied to the Court at a Special Term thereof held in and for the County of Queens on the 3rd day of May, 1943, for judgment for the [fol. 21] relief demanded in the complaint, and the court having, by its order, referred the matter to Hon. James C. Van Sieten, Official Referee, to hear and report with Findings of Fact and Conclusions of Law and the trial of the issues so referred having heretofore been had before the

said Official Referee and said Official Referee having duly made and filed his report with Findings of Fact and Conclusions of Law,

Now, on motion of Mitchell Salem Fisher, attorney for the defendant, it is hereby

Ordered that said report of Hon. James C. Van Sielen, Official Referee, be and the same hereby is confirmed, ratified and approved in all respects and it is further

Adjudged that the plaintiff, Gertrude Estin, be and she hereby is separated from the bed and board of the defendant, Joseph Estin, because of the wilful abandonment of said plaintiff by said defendant, and it is further

Ordered, adjudged and decreed that the defendant, Joseph Estin pay to the plaintiff, Gertrude Estin, for her support and maintenance, the sum of \$180 per month.

Enter

Peter M. Daly, J.S.C.

Granted, October 11, 1943. Paul Livoti, Clerk.

[fol. 22] Judgment entered October 14, 1943, 10:20 A. M.

Paul Livoti, Clerk.

Certificate of Clerk No. 8735

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this day of Oct. 21, 1943.

Paul Livoti, Clerk.

SUPREME COURT, QUEEN'S COUNTY

Index No. M. 712/1943

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

STATE OF NEW YORK,

County of New York, ss:

Jacques J. Benjamin, being duly sworn, deposes and says that he is over the age of 21 years and resides at 6440-99th Street, Forest Hills, N. Y.

That on the 27th day of October, 1943 at 319 East 50th Street, New York, N. Y., he served the annexed Judgment of Separation upon Joseph Estin, defendant in this action, [fol. 23] by delivering to and leaving with said Joseph Estin a certified copy thereof.

Deponent further says, that he knew the person so served as aforesaid to be the person mentioned and described in the said Judgment of Separation as the defendant herein.

Deponent is not a party to the action.

Jacques J. Benjamin.

Sworn to before me this 27th day of October, 1943.
John H. Kay, Notary Public, Nassau Co. No. 850.

EXHIBIT B, ANNEXED TO FOREGOING AFFIDAVIT OF GERTRUDE
ESTIN

SUPREME COURT, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

Whereas, the plaintiff has instituted this action against the defendant for a decree separating the plaintiff from [fol. 24] the bed and board of the defendant forever and providing that the defendant provide suitably out of his estate and income for the support and maintenance of the plaintiff, and further providing for the payment of attorney's fees by the defendant; and

Whereas, the summons and complaint herein, together with an order to show cause dated February 5, 1943, upon a motion for temporary alimony and counsel fee, were heretofore served upon the defendant on the 5th day of February, 1943; and

Whereas, the defendant has appeared in this action by his attorney, Mitchell Salem Fisher, but has not served an answer; and

Whereas, the aforesaid motion for alimony and counsel fee has been adjourned from time to time; and

Whereas, the parties hereto are desirous of agreeing upon the amount which shall be considered suitable for

the support and maintenance of the plaintiff by the defendant, and of agreeing further upon the amount of counsel fee to be paid by the defendant for the services of the plaintiff's attorney herein,

Now, Therefore, it is hereby stipulated and agreed as follows:

1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the court:

[fol. 25] (a) That the defendant shall pay to the plaintiff the sum of \$180.00 per month as alimony for the support and maintenance of the plaintiff herein.

(b) That the defendant shall pay the sum of \$500.00 as the reasonable counsel fee of Edwin C. Morsch, attorney for the plaintiff for his services herein.

2. That the aforesaid sum of \$180.00 per month permanent alimony shall commence as of the first day of March, 1943.

3. That the aforesaid sum of \$500.00 counsel fee shall be paid simultaneously with the signing of this stipulation.

4. In the event that the plaintiff herein at any time hereafter shall institute an action for divorce, the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action.

5. That the defendant hereby consents that if such decree of separation is entered herein, it shall contain a provision, subject to the approval of the court:

That the defendant be restrained and enjoined from leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff, in any other State [fol. 26] or foreign country, and enjoining and restraining the defendant from thereupon instituting any such action for divorce against the plaintiff in any such jurisdiction other than the State of New York, except that the foregoing shall not apply in the event that the plaintiff shall establish her residence outside of the State of New York.

6. That the defendant shall, prior to or simultaneously with the delivery of this stipulation, properly executed, deposit the sum of \$1250 with the firm of Guggenheimer & Untermeyer, 30 Pine Street, New York City, to be deposited by them in their client's trust account with Bankers Trust Company, 16 Wall Street, New York City, and held by them as security upon the following conditions:

In the event that the plaintiff makes and delivers to said firm an affidavit setting forth:

(a) that the defendant has defaulted for five days in the payment of any sum provided by this stipulation to be paid by the defendant;

(b) the calendar months of said default and the amounts thereof;

(c) that the affidavit is made knowing that said firm shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 E. 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

(e) the amount required by the plaintiff to pay any ex-[fol. 27] penses incurred by her for counsel fees, traveling expenses, incidental disbursements or other expenses of any kind whatsoever made necessary by such violation;

said firm shall deliver to the plaintiff out of said \$1250 the amount necessary to satisfy such default within five days after the delivery to said firm of said affidavit, until said fund is exhausted. Said firm shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of said \$1250 within five days after the delivery to it of said affidavit.

In the event that the plaintiff makes and delivers to said firm an affidavit setting forth

(a) that the defendant has violated the terms of paragraph 5 of this stipulation;

(b) the facts upon which said violation is asserted;

(c) that the affidavit is made knowing that said firm shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th

Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

said firm shall deliver to the plaintiff the amount stated in said affidavit as necessary for such requirement within five days after the delivery to said firm of said affidavit. Said firm shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and [fol. 28] shall have no other duty to either of the parties except to make payment out of the said \$1250 within five days after the delivery to it of said affidavit.

7. In the event that such decree of separation is entered herein, the terms of this stipulation, shall, subject to the approval of the Court, be incorporated and merged in such decree.

8. No costs shall be awarded to either party as against the other upon the entry of any such decree.

9. Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under such decree, if entered, it becomes necessary for the plaintiff to obtain the services of any process or paper or notice of any kind upon the defendant, the defendant hereby appoints his attorney, Mitchell Salem Fisher, Esq. of 30 Pine Street, New York City, as his agent and attorney-in-fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot, with reasonable diligence, be found within the City of New York.

Dated: March 16, 1943.

(Signed) Edwin C. Morsch, Attorney for plaintiff.
Gertrude Knudsen Estin, Plaintiff in person.
Mitchell Salem Fisher, Attorney for defendant.
Joseph Estin, Defendant in person.

The deposit of \$1250 is herewith acknowledged and is to be held in accord with the above stipulation.

[fol. 29] EXHIBIT B1, ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

SUPREME COURT, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

Whereas, the parties to this action have heretofore and on March 16, 1943, entered into a stipulation wherein it is provided for the payment of certain sums of money by the defendant to the plaintiff and for other matters therein set forth; and

Whereas, the said stipulation contains a provision that the sum of \$1250.00 shall be deposited in escrow with the firm of Guggenheimer & Untermeyer, 30 Pine Street, New York City, subject to certain terms and conditions thereunto attaching; and

Whereas, it has been found to be inconvenient to deposit said sum of money with the aforementioned firm; and

Whereas, the parties hereto have agreed upon a different depository and escrow agent and another mode of making said deposit,

Now, therefore, it is hereby stipulated and agreed as follows:

1. That this stipulation shall be considered as an addition [fol. 30] to and an amendment of and constitute a part of the aforementioned stipulation dated March 16, 1943.

2. The sum of \$1250.00 mentioned in the aforementioned stipulation shall be deposited in escrow with Mitchell Salem Fisher, Esq., of 30 Pine Street, New York City, and Edwin C. Morsch, Esq., of 155-31 Jamaica Avenue, Jamaica, New York, the respective attorneys for the defendant and the plaintiff herein, in a joint account, and be held by them as security upon the following conditions:

In the event that the plaintiff makes and delivers to each of said escrow agents a duplicate original affidavit setting forth

(a) that the defendant has defaulted for five days in the payment of any sum provided by this stipulation to be paid by the defendant;

(b) the calendar months of said default and the amounts thereof;

(c) that the affidavit is made knowing that said escrow agents shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

said escrow agents shall deliver to the plaintiff out of said \$1250.00 the amount necessary to satisfy such default within five days after the delivery to said escrow agents of said affidavit, until said fund is exhausted. Said escrow agents [fol. 31] shall not be under any duty to inquire with respect to the facts and circumstances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of said \$1250.00 within five days after the delivery to them of said affidavit.

Delivery of said affidavit may be by registered mail to the addresses of the respective escrow agents hereinabove set forth.

In the event that the plaintiff makes and delivers to said escrow agents duplicate original affidavits setting forth

(a) that the defendant has violated the terms of paragraph 5 of this stipulation;

(b) the facts upon which said violation is asserted;

(c) that the affidavit is made knowing that said escrow agents shall rely upon same;

(d) that a copy of the affidavit has been sent to the defendant by registered mail addressed to him at 319 East 50th Street, New York City (or such other address of which the defendant shall have previously advised the plaintiff by registered mail);

(e) the amount required by the plaintiff to pay any expenses incurred by her for counsel fees, traveling expenses, incidental disbursements or other expenses of any kind whatsoever made necessary by such violation; said escrow agents shall deliver to the plaintiff the amounts stated in said affidavit as necessary for such requirements within five days after the delivery to said escrow agents of said duplicate original [fol. 32] affidavit. Said escrow agents shall not be under any duty to inquire with respect to the facts and circum-

stances set forth in said affidavit and shall have no other duty to either of the parties except to make payment out of the said \$1250.00 within five days after the delivery to each of said escrow agents of said affidavit.

3. The plaintiff and the defendant shall have the right at any time respectively to nominate a new escrow agent on her or his behalf, that is the plaintiff may nominate a new escrow agent in place of stead of Edwin C. Morsch, and the defendant may nominate such new escrow agent in place and stead of Mitchell Salem Fisher; such nominations of a new escrow agent to be made by sending a registered letter, return receipt requested, to each of said escrow agents at the addresses hereinabove given, stating the name of the new escrow agent, whereupon the name of such new agent shall be substituted in the place and stead of the old escrow agent upon such account. Such new or substitute escrow agent shall be an attorney at law of the State of New York, and shall have an office for the practice of law within the City of New York.

4. The aforesaid sum of \$1250.00 shall be deposited in Jamaica Savings Bank, at 161-02 Jamaica Avenue, Jamaica, New York, in the joint names of the aforementioned escrow agents and subject to withdrawal by their joint signatures only. It is understood and agreed that the amount of interest which shall be credited by the aforementioned bank to the aforementioned account shall be paid to the afore-[fol. 33] mentioned escrow agent as and for their compensation for service as such escrow agents.

5. In all other respects the original stipulation dated March 16, 1943, shall remain in full force and effect and shall be construed together with this stipulation so that both stipulations shall constitute one instrument.

Dated: April 1, 1943.

Edwin C. Morsch, Attorney for Plaintiff. Gertrude Estin, Plaintiff in person. Mitchell Salem Fisher, Attorney for Defendant. Joseph Estin, Defendant in person.

G. E., E. C. M., M. F., J. E.

The deposit of \$1250.00 is herewith acknowledged and is to be held in escrow in account with the above stipulation.
Dated April 8, 1943.

Edwin Morsch, Mitchell Salem Fisher.

[fol. 34] STATE OF NEW YORK,
County of New York, ss:

On this 1st day of April, 1943 before me personally appeared Gertrude Estin, to me known and known to me to be the person described in and who executed the foregoing stipulation, and she acknowledged to me that she executed the same.

Abraham Lynn Dubinbaum, Notary Public, Bronx Co.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of April, 1943, before me personally appeared Joseph Estin, to me known and known to me to be the person described in and who executed the foregoing stipulation, and he acknowledged to me that he executed the same.

Robert J. Goldstein, Notary Public, New York.
G.E., E. C. M., M. F., J. E.

[fol. 35] EXHIBIT B2 ANNEXED TO FOREGOING AFFIDAVIT OF
GERTRUDE ESTIN

April 12, 1943.

Edwin C. Morsch, Esq., 155-31 Jamaica Avenue, Jamaica,
New York, and
Mitchell Salem Fisher, Esq., 30 Pine Street, New York, N. Y.

DEAR SIRs:

You have advised us that on April 8, 1943 when you sought to deposit the \$1250.00 paid under the stipulations of March 16, 1943 and April 1, 1943, the Jamaica Savings Bank would not accept the deposit unless, in the event of the death of one of you, the survivor would be able to withdraw the entire amount.

Since that arrangement was not in accord with the understanding, you thereupon advised that you deposited the said \$1250.00 in a joint account, without right of survivorship, in the Queens County Federal Savings and Loan Association of Jamaica; that said account number is #11339 and that a notice that two signatures are required, has been placed on the account.

We do hereby and each of us consent to the change in the deposit from the Jamaica Savings Bank to said Queens County Federal Savings and Loan Association of Jamaica, it being understood that the terms of the stipulations as to this \$1250.00 shall apply to this deposit in the Queens County Federal Savings and Loan Association of Jamaica, [fol. 36] to the same extent as if said monies had been deposited in the Jamaica Savings Bank.

Very truly yours, (Signed) Joseph Estin, Gertrude Estin.

We agree that the \$1250.00 deposited in the Queens County Federal Savings and Loan Association of Jamaica is held by us jointly in escrow without right of survivorship, pursuant to the terms of the stipulations dated March 16, 1943 and April 1, 1943.

(Signed) Mitchell Salem Fisher, Edwin C. Morsch.

EXHIBIT C ANNEXED TO FOREGOING AFFIDAVIT OF GERTRUDE ESTIN

Guggenheimer & Untermeyer

30 Pine Street, New York

April 3, 1944.

Roy Guthman, Esq., 11 West 42nd Street, New York, N. Y.

DEAR SIR:

I hereby confirm to you the advice which I gave you and [fol. 37] Mrs. Gertrude Estin at the conference at this office last week, that Mr. Estin has revoked my appointment as agent and attorney-in-fact to receive the service of any process or paper or notice of any kind.

Mr. Estin refers particularly to paragraph "9" of the stipulation dated March 16, 1943 and the supplemental stipulation dated April 1, 1943 and in particular to paragraph "9."

Mr. Estin has advised me that any such authority by me to accept any process of any kind on his behalf, whether in connection with the action in which said stipulations were signed or otherwise, has been and is revoked and cancelled.

Said revocation bears the date of February 23, 1944 and was received by me a few days thereafter.

You are advised accordingly.

Very truly yours, Mitchell Salem Fisher.

MSF:E. CC to Edwin C. Morsch, Esq., 155-31 Jamaica Avenue, Jamaica 2, N. Y. Via: Registered Mail. Via: Ordinary Mail.

[fol. 38] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GEORGE S. WING, SWORN TO MARCH 28, 1946,
READ IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:

George S. Wing, being duly sworn, deposes and says: I am an attorney at law and one of the attorneys for the defendant herein.

The defendant opposes this motion by the plaintiff for an order directing that judgment be entered against the defendant for moneys alleged to be due for alimony and for counsel fees, and the defendant has caused to be made a motion to be heard at the same time to vacate or modify the judgment of separation granted and entered on the 11th day of October, 1943, so far as same provides for the payment of alimony. Notice of such motion and affidavits have been served upon the plaintiff as of March 23, 1946, returnable April 3, 1946.

The affidavits and exhibits to be submitted in support of that motion are with very slight exceptions the same as those attached and submitted herewith. In such instances when copies of affidavits and exhibits are included in these papers, the originals thereof will be found in the moving papers submitted upon the defendant's motion.

The plaintiff asks for counsel fees. These counsel fees would appear from the plaintiff's affidavit to be largely for [fol. 39] services to be rendered in the event she obtains a judgment and is required to take the proceeding to a foreign state for the enforcement of such judgment. This is remote and speculative and the application is premature. There

is no manner of determining that any such expenses will be necessary or will be incurred and any application for such counsel fees, if such an application would at any time be warranted, must be made when such services are to be required, either to the court of this state or the foreign state to which the plaintiff states she must proceed.

Furthermore, the payment of any counsel fees, it is submitted, is excluded from consideration by the terms of the stipulation which the plaintiff makes a part of her moving papers upon this motion.

Any application for counsel fees should be denied.

(Sworn to by George S. Wing, March 29, 1946.)

[fol. 40] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JOSEPH ESTIN, SWORN TO MARCH 19, 1946, READ
IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEVADA,

County of Washoe, ss:

Joseph Estin, being duly sworn, deposes and says: I reside at the Wyn Hotel, 134 East Second Street, Reno, Nevada, and am the defendant in the above entitled action.

I have read the affidavit of Gertrude Estin, sworn to the 16th day of February, 1946, attached to and made a part of the motion papers herein. Numerous of the facts therein set forth are untrue, notable among which are those respecting my financial circumstances.

The plaintiff moves for an order directing the entry of a judgment against me for the sum of \$1,620.00, arrears in payment of sums of money with interest alleged to be due to the plaintiff under the judgment of this Court made and entered on October 11th, 1943, copy of which judgment is made a part of the moving papers herein.

Plaintiff seeks to recover judgment for the monthly payments of alimony alleged to have been due as of June 5th, 1945, and on subsequent months to and including February, 1946.

A Decree of Absolute Divorce in my favor and against Gertrude Estin, the plaintiff herein, was made and entered

on May 24th, 1945, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, [fol. 41] exemplified copy of which Decree, together with the Judgment Roll in said action, is submitted herewith and marked Exhibit 1.

The plaintiff and myself were married on July 20th, 1937, in the State of Indiana. That owing to differences, since April 14th, 1942, we have lived apart. In January, 1944, after disposing of my interest in the business with which I was connected, I left New York with the intention of going to San Francisco, California, to live. On my way to California I stopped among other places at Reno, Nevada, and becoming favorably impressed with that city as a place in which to live, I took up my residence at the Hotel El Cartez with the full intention of making Reno my permanent place of residence. Other than while upon several trips away from that city, none of which exceeded approximately two or three weeks' time, with the exception of one longer trip in the summer of 1944, I have remained continuously in Reno up to and including the present time. On November 9th, 1944, I moved to the Wyn Hotel, No. 134 East Second Street, Reno, Nevada, where I have ever since resided, and now reside.

I have been a registered voter in Washoe County, Nevada, since March 28th, 1945. Certificate of the County Clerk of Washoe County to this effect is submitted herewith and marked Exhibit 1-A. Since May 4th, 1944, I have maintained a bank account in a bank in Reno.

I prepared and filed my United States Individual Income Tax Return, for the year 1944, giving as my residence No. [fol. 42] 134 East Second Street, Reno, Nevada. For the year 1945, I likewise prepared and filed my Income Tax Return, bearing the same address. On March 14, 1945, I prepared and filed a Declaration of Estimated Income therein stating my address to be No. 134 East Second Street, Reno, Nevada. True and correct photostatic copies of the headings of these tax returns and the Declaration of Estimated Income are attached to and made a part of this affidavit, and marked Exhibits 2, 3 and 4, respectively.

On November 8th, 1944, I paid my Poll Tax and received a receipt therefor, which receipt is attached hereto and marked Exhibit 5. I likewise paid my Poll Tax for the year 1945 on January 4th, 1945, and for 1946 on January 9th,

1946, and received receipts therefor, which receipts for the respective years are attached hereto and marked Exhibits 6 and 7.

On January 4th, 1945, I paid my Personal Property Tax and received a receipt therefor from the County Assessor, and likewise on January 9th, 1946, I paid my Personal Property Tax for the year 1946, and received receipts therefor, which receipts are hereto attached and marked Exhibits 8 and 9.

In the year 1944, automobile license No. 10595, for the State of Nevada was issued to me. On January 4th, 1945, I received a renewal of such auto license as No. 3375, for the year 1945, and on January 9th, 1946, I again renewed such license as No. 1479 for the year 1946.

A statement issued by the County Assessor, dated January 9th, 1946, confirming the aforesaid statements regard-[fol. 43] ing my auto license and the other taxes paid by me is attached hereto and made a part hereof and marked Exhibit 10.

I have, ever since I took up my residence in Reno, Nevada, in January, 1944, maintained same in that City and State continuously, and it is my present intention to continue to do so in the future. My personal effects have been during that period and are now at my said place of residence, and I have, during the aforesaid time, maintained no other place of residence.

At the time I left New York with the intention of proceeding to California, and thereafter having changed my plans and taken up my domicile in Reno, Nevada, this was not done with the intent or the purpose of commencing an action for divorce against my then wife, the plaintiff herein. After having resided in Reno, Nevada, for a considerable period of time, I undertook through my attorney in New York to work out a settlement between my then wife and myself, but this was not accomplished, and it was not until I had resided in Reno for approximately 15 months, and after a settlement of the controversy appeared impossible, did I take steps to commence the action which thereafter resulted in the divorce in the Nevada Court.

The plaintiff attaches and makes a part of the moving papers a certain stipulation between the parties hereto dated March 16th, 1943, and marked Exhibit B, with two further stipulations, dated April 1st, 1943, and April 12th, 1943, marked Exhibits B' and B'' respectively, which modify

[fol. 44] or amplify the first stipulation. This stipulation reads in part as follows:

“Now, therefore, it is hereby stipulated and agreed as follows:

1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the Court;”

The stipulation then proceeds to set forth certain terms and conditions as to the rights of the respective parties.

Subsequent to the signing of this stipulation, an action for separation was commenced by the plaintiff against me, and upon my default therein the matter was submitted by the Court to an Official Referee to hear and determine and to make Findings of Fact and Conclusions of Law, which was done. As I am informed this stipulation was offered in evidence upon the hearing before the Referee.

Proposed Findings of Fact and Conclusions of Law were prepared and presented to the Referee, which included therein the various provisions which were contained in the stipulation aforesaid. The Referee struck out and declined to adopt or include in the Findings and Conclusions made by him any of those provisions contained in the stipulation, except that provision as to the amount of alimony to be paid. The Judgment which was therefore granted and entered upon the Referee's Findings of Fact and Conclusions of Law makes no provision respecting the various [fol. 45] matters contained in the stipulation, except as to the amount of alimony.

The plaintiff seeks to recover judgment for alimony payable during the month of June, 1945, and subsequent months. All of this period of time was subsequent to the granting of the judgment of divorce by the Nevada Court, and for a time after which the marital relationship had been terminated.

Wherefore, it is respectfully urged that the motion herein be denied and that the defendant have such other and further relief as to the Court may seem just and proper.

(Sworn to by Joseph Estin, March 19, 1946.)

[fol. 46] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF LLOYD V. SMITH, SWORN TO MARCH 19, 1946,
READ IN OPPOSITION TO PLAINTIFF'S MOTION

STATE OF NEVADA,
County of Washoe, ss:

LLOYD V. SMITH, being first duly sworn, on oath deposes and says:

That he is an attorney at law, licensed to practice in all of the Courts of the State of Nevada, and has been such since the 16th day of May, 1930; that he maintains his offices in the Byington Building, 15 West Second Street, Reno, Nevada. That he specializes in domestic relations matters and is familiar with and knows the laws of the State of Nevada having to do with divorce.

That he represented Joseph Estin, the defendant in the above-entitled action, in proceedings for divorce that were instituted in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the 17th day of April, 1945. That said action was commenced by the filing of a complaint for divorce in which Joseph Estin, the defendant herein, was named as plaintiff, and Gertrude Estin, plaintiff herein, was named as defendant. That in compliance with the laws of the State of Nevada an affidavit for publication of summons was filed on the said [fol. 47] 17th day of April, 1945, in which it was alleged that the said Gertrude Estin was not a resident of the State of Nevada, but was a resident of the State of New York, and resided at 353 West 57th Street, New York City, New York, and which affidavit for publication prayed that an order of the Court issue permitting service of process by publication. That the said Second Judicial District Court of the State of Nevada did on the 17th day of April, 1945, enter its order directing that service of process be made upon the defendant, Gertrude Estin, by publication and mailing, or in lieu thereof by due service of a copy of the summons and a certified copy of the complaint on said defendant in person, outside of the State of Nevada. That thereafter, and on the 20th day of April, 1945, personal service of a certified copy of the complaint filed and sum-

mons issued was served upon Gertrude Estin by delivering the same to her in New York City, all in compliance with the laws of the State of Nevada. That said summons directed that the said defendant, Gertrude Estin, appear within thirty days and defend the said action for divorce. That the said defendant, Gertrude Estin, did not appear within thirty days and file any pleading in said action. That on the 24th day of May, 1945, in open court, the default of the defendant for failing to answer or otherwise plead within the time permitted by law was entered, and on said day and on motion of Lloyd V. Smith, Esq., attorney for plaintiff in said divorce action, the action was set for hearing and evidence was introduced on behalf of the [fol. 48] plaintiff and the matter thereafter submitted to the Court for its consideration. That on the said day the Court, having considered the matter, made and entered its Findings of Fact and Conclusions of Law directing that Decree of Divorce be granted to the plaintiff, and on the same day the Court made and entered its Decree of Divorce dissolving the bonds of matrimony theretofore existing between the plaintiff and defendant in said action, and granting to the plaintiff, Joseph Estin, an absolute decree of divorce.

That more than six months since the entry of said Decree of Divorce on the 24th day of May, 1945, have elapsed. That the Court has lost all jurisdiction to amend, modify or set aside the said Decree of Divorce, and that the said Decree of Divorce is in all respects final and absolute.

That the proceedings had in said action for divorce were in all respects in full compliance and in pursuance with the provisions of the law of the State of Nevada.

That your affiant knows of his own knowledge that said Joseph Estin for more than one year prior to the entry of the Decree of Divorce was a resident of the State of Nevada and that since the entry of the Decree of Divorce has continued to reside in Reno, Nevada.

(Sworn to by Lloyd V. Smith, March 19, 1946.)

[fol. 49] AFFIDAVIT OF MARJORIE DeVaul, Sworn to March 1, 1946, Read in Opposition to Plaintiff's Motion

STATE OF NEVADA,

County of Washoe, ss:

MARJORIE DeVaul, being first duly sworn, on oath deposes and says:

That I own the lease on the Hotel Wyn, located at 134 East Second Street, Reno, Nevada, and am the Manager of said Hotel.

That I am personally acquainted with Joseph Estin; that I first met the said Joseph Estin on November 9, 1944, at which time he engaged accommodations at my hotel in Reno, Nevada; that since said date he has retained said accommodations and still retains said accommodations. That I do not keep an accurate check of the times and dates that Mr. Joseph Estin personally occupies said accommodations, but know of my own knowledge that he has since November 9, 1944, been present here in Reno, Nevada, and occupied said accommodations at least seventy per cent (70%) of the time. That at all times his personal possessions and property are in said accommodations. That he continually receives his mail at the Hotel Wyn in Reno, Nevada.

(Sworn to by Marjorie DeVaul, March 1, 1946.)

[fol. 50] EXHIBIT 1, Read in Opposition to Plaintiff's Motion

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

COMPLAINT—Filed April 17, 9:11 A.M. '45. E. H. Beemer, Clerk, by B. Buchanan, Deputy

Comes now the above named plaintiff and complaining of the defendant for cause of action against,

and divorce from, defendant, alleges and avers as follows:

I

That the plaintiff is now, and for more than six weeks immediately preceding the commencement of this action has been, an actual bona fide resident of the State of Nevada, and during all of said time has been actually, physically and corporally present in said State, and still is, and during all of said time has had his actual residence and home in said State and took up his residence and home with an intention to remain permanently, which intention continued during all of said time, and still continues, and plaintiff still [fol. 51] resides in said State aforesaid; and that the said plaintiff is now domiciled in the State of Nevada, with an intention to make his permanent home in said State for an indefinite period of time.

II

That plaintiff and defendant were married in the City of Crown Point, Indiana, on the twentieth day of July, 1937, and ever since said date have been, and now are, husband and wife.

III

That there are no children the issue of said marriage.

IV

That there is no community property belonging to the plaintiff and the defendant in the State of Nevada, or elsewhere.

The Supreme Court in and for the State of New York, County of Queens, did, on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof.

[fol. 52]

V

That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day

of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation.

Wherefore, plaintiff prays judgment:

1. That the bonds of matrimony now existing between plaintiff and defendant be dissolved and that each of the parties to this action be restored to the status of single persons and that plaintiff be granted an absolute decree of divorce from defendant.

Lloyd V. Smith, Attorney for Plaintiff.

STATE OF NEVADA,

County of Washoe, ss:

Joseph Estin, of full age, being first duly sworn, deposes and says as follows:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, [fol. 53] and as to those matters he believes it to be true.

Joseph Estin.

Subscribed and sworn to before me this 16th day of April, 1945. Lloyd V. Smith, Notary Public in and for the County of Washoe, State of Nevada. My Commission Expires Sept. 19, 1948. (Seal.)

Default of the defendant for failing to appear, entered in open court, 24th day of May, A. D. 1945.

E. H. Besmer, Clerk, by A. L. Donati, Deputy Clerk.

[fol. 54] Lloyd V. Smith, Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed Apr. 17, 9:11 A. M., '45. E. H. Beemer, Clerk, by
B. Buchanan, Deputy.

Affidavit for Publication of Summons

STATE OF NEVADA,

County of Washoe, ss:

Joseph Estin, being first duly sworn, deposes and says: That affiant is the plaintiff named in the suit entitled above; that said suit has been commenced by the filing of a verified complaint and the issuance of summons thereon; that said suit is brought to obtain a decree of divorce by plaintiff from defendant, and that a good cause of action exists therefor in favor of plaintiff and against defendant, as follows:

That plaintiff is now an actual and bona fide resident and domiciled within Washoe County, Nevada, and that said plaintiff, for a period of more than six weeks, preceding [fol. 55] the filing of complaint herein, has been an actual and bona fide resident of and domiciled within the State of Nevada; that plaintiff and defendant were married to each other at Crown Point, Indiana, on July 20, 1937, and ever since have been and are now wife and husband; that although during the married life of plaintiff and defendant, plaintiff's conduct was in accordance with the marital duties, defendant and plaintiff have lived separate and apart for a period of three consecutive years, without cohabitation, all in form and manner specifically alleged in the complaint filed herein, reference to which hereby expressly is made.

That defendant is a necessary and proper party defendant in this suit; that summons cannot be served on defendant

in person within the State of Nevada; that defendant is not now in and cannot be found in the State of Nevada; and that defendant's present residence and address are:

Gertrude Knudsen Estin
353 W. 57th Street
New York, New York.

Wherefore, affiant prays for an order of Court directing that service of process be made herein on defendant by the publication of summons in some newspaper designated as most likely to give notice to defendant of the pendency of this suit, and by mailing to defendant, at said last known address, a copy of the Summons attached to a duly certified copy of the Complaint, all in manner and form required by law, and further directing that personal service of process, [fol. 56] in due form, upon defendant outside the State of Nevada, be equivalent to complete service by publication and mailing; and for all proper relief in the premises.

Joseph Estin.

Subscribed and sworn to before me this 17th day of April, 1945. Lloyd W. Smith, Notary Public, Washoe County, Nevada. (Seal.)

Lloyd V. Smith, Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed Apr. 17, 9:11 A. M., '45. E. H. Beemer, Clerk, by
B. Buchanan, Deputy.

Order for Publication of Summons

Upon reading the affidavit of plaintiff, duly filed herein, it appears to the satisfaction of the Court, and the Court finds, that defendant herein resides outside of the State of

[fol. 57] Nevada, that defendant cannot be found within the State of Nevada, and that summons herein cannot be served upon defendant in person within the State of Nevada; and it appearing from said affidavit and from the verified complaint filed herein, and the Court here finds, that a cause of action exists in favor of plaintiff and against defendant, that defendant is a necessary and proper party herein, and that the residence and address of defendant are

Gertrude Knudsen Estin
353 West 57th Street
New York, New York

and it further appearing that the Reno Evening Gazette is a newspaper published in the City of Reno, Washoe County, State of Nevada, and is the newspaper most likely to give notice to defendant of the pendency of the suit;

Now, therefore, it is hereby ordered that summons in this suit be served on defendant herein, by publication thereof in the above named newspaper; and that said publication be made for a period of four weeks and at least once a week during said time;

It is further ordered and directed, that a copy of the summons and a certified copy of the complaint be deposited forthwith in the United States Post Office at Reno, Nevada, enclosed in an envelope upon which the postage is fully prepaid, addressed to defendant, at

Gertrude Knudsen Estin
353 W. 57th Street
New York, New York.

[fol. 58] It is further ordered that due service of a copy of the summons and a certified copy of the complaint on defendant in person outside the State of Nevada shall be equivalent to complete service by publication and deposit in the United States Post Office, and that such process may be served upon defendant as prescribed by statute.

Done in open Court, April 17", 1945.

Edgar Eather, District Judge, Presiding.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF WASHOE

No. 89547

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Dept. No. 1. Filed May 24, 10:36 AM., '45. E. H. Beemer,
Clerk. By V. Whitehead, Deputy.

Summons

The State of Nevada Sends Greetings to the Said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this Summons if served in said [fol. 59] county, or within twenty days if served out of said county but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above-entitled action. This action is brought to recover a judgment, against you, granting to Plaintiff a decree of divorce, forever dissolving the bonds of matrimony now existing between you and plaintiff on the ground of three years continual separation, without cohabitation, as will more fully appear from the verified complaint on file herein.

Dated this 17th day of April, A. D. 1945.

E. H. Beemer, Clerk of the Second Judicial District
Court of the State of Nevada, in and for Washoe
County. By B. Buchanan, Deputy. (Seal.)

Lloyd V. Smith, Reno, Nevada, Attorney for Plaintiff.

[fol. 60]

Affidavit of Service

STATE OF NEW YORK,
County of New York, ss:

Jacques J. Benjamin being first duly sworn, deposes and says: That he is and was on the day when he served the annexed summons, a citizen of the United States, over the age of twenty-one years, and not a party to the above

entitled action; that he received the annexed summons in said action on the 20- day of April, 1945 and personally served the same upon Gertrude Knudsen Estin the above-named defendant on the 20- day of April 1945, by delivering to Gertrude Knudsen Estin the said defendant personally in New York City, County of New York, State of New York, a copy of the annexed summons attached to a duly certified copy of the complaint in the above-entitled action.

Jacques J. Benjamin.

Subscribed and sworn to before me this 20th day of April, 1945. Robert J. Goldstein, Notary Public in and for the County of New York, State of New York. My Commission expires March 30, 1946. (Seal.)

Robert J. Goldstein, Notary Public. New York Co. Clk's No.—. New York County Register's No. 199G6. Certificate filed Westchester County. Commission expires March 30, 1946.

[fol. 61] No. 89547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed May 24, 2:22 PM., '45. E. H. Beemer, Clerk. By M. Dowd, Deputy.

Findings of Fact and Conclusions of Law

This case came on regularly for trial upon this 24th day of May, 1945, before the undersigned Judge of said Court, sitting without a jury. Plaintiff was present in person and by his attorney, Lloyd V. Smith, Esq. Defendant was not present, although Defendant had been personally served with summons on the 20th day of April, 1945, and thereupon the default of the Defendant was noted and entered at length in the Minutes.

Certain evidence was adduced by the Plaintiff, and the Plaintiff was sworn and examined in his own behalf, whereupon the Plaintiff rested, and there being nothing offered on the part of the Defendant, the case was thereafter submitted to the Court for its decision.

The Court then and there being fully advised in the premises and having considered and understood the law and [fol. 62] the evidence, rendered its decision in favor of the Plaintiff and against the Defendant and ordered that Findings of Fact, Conclusions of Law and Decree be drawn in accordance therewith.

Now, therefore, in accordance with the foregoing decision the Court makes its Findings of Fact from the evidence as follows:

Findings of Fact

The Court finds as a matter of fact:

I

That plaintiff is now, and ever since the 30th day of January, 1944, has been an actual, bona fide resident of the State of Nevada and that for more than six weeks immediately preceding the commencement of this action Plaintiff has been actually physically and corporeally present in said State and during all of said time has had his actual residence and home in said State, and took up his residence and home with an intention to remain permanently, which intention continued during all of said time and still continues and Plaintiff still resides in said State aforesaid; and that said Plaintiff is now domiciled in the State of Nevada with an intention to make his permanent home in said State for an indefinite period of time.

II

That Plaintiff and Defendant were married in the City of [fol. 63] Crown Point, Indiana, on the twentieth day of July, 1937, and ever since said date have been, and now are, husband and wife.

III

That there are no children the issue of said marriage.

IV

That there is no community property belonging to the Plaintiff and the Defendant in the State of Nevada, or elsewhere.

The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the Defendant herein and against Plaintiff herein, awarding to the Defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That Plaintiff herein has at all times since the entry of the decree complied with the terms thereof. That said New York Supreme Court Judgment is not *res judicata* of the matters alleged in Plaintiff's complaint.

V

That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the Plaintiff and Defendant have lived separate and apart without cohabitation.

[fol. 64]

Conclusions of Law

From the foregoing facts the Court draws the following Conclusions of Law:

I

That the Plaintiff is now and since the 30th day of January, 1914, has been an actual bona fide resident of the State of Nevada.

II

That Plaintiff is entitled to the Judgment and Decree of this Court for an absolute divorce from Defendant on the ground that the parties have lived separate and apart for a period of more than three consecutive years, without cohabitation.

Let judgment be entered accordingly.

Done in open Court this 24th day of May, 1945.

Wm. McKnight, District Judge.

[fol. 65]

No. 89547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed May 24, 2:23 PM, '45. E. H. Beemer, Clerk. By
M. Dowd, Deputy.

Decree

This case came on regularly for trial before the undersigned Judge of said Court, sitting without a jury, Plaintiff appearing in person and by his attorney, Lloyd V. Smith, Esq., and the defendant not appearing, although Defendant had been personally served with summons on the 20th day of April, 1946, and thereupon the default of the Defendant was noted and entered at length in the Minutes, and such proceedings were regularly had herein that on this, the 24th day of May, 1945, the Court rendered its decision in favor of the Plaintiff and against the Defendant, made and entered herein its certain Findings of Fact and Conclusions of Law and ordered that Judgment be entered accordingly.

Now, therefore, in consideration of the premises and in [fol. 66] conformity with said Decision, Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows:

That the Plaintiff is a bona fide resident of the County of Washoe, State of Nevada and has been such since the 30th day of January, 1944.

It is further ordered, adjudged and decreed that Plaintiff be, and he hereby is, granted a decree of divorce from Defendant on the ground of three years continual separation, without cohabitation, same being final and absolute in form, force and effect, the laws of the State of Nevada providing no interlocutory period or conditions or restrictions on remarriage; and that the bonds of matrimony now and heretofore existing between Plaintiff and Defendant are fully, completely and forever dissolved and that Plaintiff

and Defendant are both and each hereby restored to the status of single persons.

Done in open Court this 24th day of May, 1945.

Wm. McKnight, District Judge.

Recorded in Judgment Record Book A 69, Page 554.
E. H. Beemer, County Clerk. By A. L. Donati, Deputy Clerk.

[fol. 67]

No. 89547

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Judgment Roll

Filed May 24th, A. D. 1945. E. H. Beemer, Clerk. By
A. L. Donati, Deputy Clerk.

Lloyd V. Smith, Attorney for Plaintiff. — — —, At-
torney for Defendant.

[fol. 68]

Lloyd V. Smith
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Filed 1945, May-24-PM. 1:55. E. M. Beemer, Clerk. By
B. Ellsworth, Deputy.

Affidavit

STATE OF NEVADA,
County of Washoe, ss:

I, Joseph Estin, the plaintiff above named, being first duly sworn depose and say:

That I make this Affidavit in compliance with the requirements of the act of Congress entitled "Soldiers' and Sailors' Civil Relief Act of 1940."

That the above named defendant, Gertrude Knudsen Estin, is not now in, and has not within sixty days last past been discharged from military service as defined in said Act, and in support thereof affiant states the following to be the facts:

That Defendant is over the age of military service and resides at New York City, New York, and is employed by [fol. 69] Johnson & Higgins, 63 Wall Street, New York, New York, and has been so employed for the past twenty years.

Joseph Estin.

Subscribed and sworn to before me this 24th day of May, 1945. Lloyd V. Smith. (Seal.)

No. 89,547. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

JOSEPH ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

Be It Remembered, that the above entitled action come on regularly for trial in Department No. 1 of the above entitled Court, on Thursday, the 24th day of May, A. D. 1945, at the hour of 2:05 o'clock P. M. of said day, before Hon. William McKnight, Judge of said Court, sitting without a jury. [fol. 70] Plaintiff was present in person and represented by his attorney, Lloyd V. Smith, Esq.

Defendant did not appear.

J. A. Callahan, Reporter pro tempore of said Court, was present and acted as such, and thereupon the following proceedings were had, and testimony taken, to wit:

The Court: This is case No. 89,547—Estin v. Estin.

Mr. Smith: Ready, your Honor.

The Court:

Q. Have you examined the record in this case, Miss Clerk?

Deputy Clerk Ellsworth:

A. I have, your Honor.

Q. When?

A. Before coming into Court.

Q. Has there been any answer, demurrer or other pleading filed on behalf of the defendant?

A. No appearance, your Honor.

The Court: You will therefore enter the default of the defendant for failing to demur, answer or otherwise plead to plaintiff's complaint within the time required by law.

You may proceed.

Testimony of MARGARET BRAULT, who was first duly called and sworn as to a witness on behalf of the plaintiff, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your name.

A. Margaret Brault.

[fol. 71] Q. Are you employed in Reno, Nevada?

A. Yes, sir.

Q. Where are you employed?

A. At the El Cortez Hotel in Reno, Nevada.

Q. In what capacity?

A. Clerk.

Q. Are you acquainted with Joseph Estin, the plaintiff in this action?

A. I am.

Q. When did you first meet him?

A. January 30, 1944.

Q. Under what circumstances?

A. He came to establish his permanent residence.

Q. Did he take up his permanent residence at the Hotel El Cortez?

A. Yes, on January 30, 1944.

Q. How long did he reside at the hotel continuously thereafter?

A. Until March 23, 1944.

Q. Did you have occasion to see him at the hotel later?

A. Yes, sir, from April 19, 1944.

Q. From January 30, 1944, to March 23, 1944, did you have occasion to see him in Reno, Washoe County, Nevada, each and every day?

A. Yes.

Q. And from April 19, 1944, to May 16, 1944, did you have occasion to see him in Reno, every day?

A. Yes.

Q. And he came back on November 3, 1944?

A. Yes, he came back on November 3, 1944, and remained until November 9, 1944.

Q. Did you see him each day between those dates?

A. Yes, sir, I did.

Mr. Smith: That is all.

The Court: That is all. You may be excused.

[fol. 72] Testimony of MARJORIE DUVALL, who was first duly called and sworn as a witness on behalf of the plaintiff, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your name.

A. Marjorie Duvall.

Q. Where do you live?

A. 134 East Second Street, The Wyn Hotel, in Reno, Nevada.

Q. Do you own or manage that hotel?

A. I am the owner and manager.

Q. Are you acquainted with Joseph Estin, the plaintiff in this action?

A. Yes.

Q. When did you first meet him in Reno, Nevada?

A. November 9, 1944.

Q. Under what circumstances?

A. As a guest in the hotel.

Q. Did he take accommodations at your hotel on November 9, 1944?

A. Yes.

Q. Ever since that date has he continuously had those accommodations?

A. Yes, he is still at the hotel. He has been away a few times in the last few months.

Q. Has he at all times maintained accommodations there?

A. Yes.

Q. For more than six weeks prior to April 16, 1945, did you have occasion to see him each and every day here in Reno, Nevada?

A. Yes.

Q. Since April 17, 1945, he has been away how often?

A. About three or four times at two, three or four weeks at a time.

[fol. 73] Q. You state emphatically that he has continued to keep his accommodations there at all times, even when he was away; is that correct?

A. Yes, sir.

Mr. Smith: That is all.

The Court:

Q. Was that three or four weeks or days ago?

A. I do not understand.

Q. I understood you to say that since April 17, 1945, he has been away for three or four weeks at a time. Do you mean three or four weeks or three or four days at a time?

A. No, the last few months he has been away two or three weeks at a time.

Q. Since April 17, 1945, how much time has he been away?

A. He has been away once, I believe.

The Court: That is all. You may be excused.

Mr. Smith: Will you go forward.

Testimony of JOSEPH ESTIN, who was first duly called and sworn as a witness on behalf of himself, testified as follows, to wit:

Direct examination.

Mr. Smith:

Q. Will you please state your full name.

A. Joseph Estin.

[fol. 74] Q. Are you the plaintiff in this action in which Gertrude Knudsen is the defendant?

A. I am.

Q. Where do you live?

A. I live at 134 East Second Street, The Wyn Hotel, Reno.

Q. When did you first come to the State of Nevada?

A. January 30, 1944.

Q. Did you have any intention at that time concerning a residence?

A. I was on my way to San Francisco when I passed through Reno and decided to stop off and look things over, and after staying here about a week I decided to establish a permanent residence here.

Q. Could you fix any date as to the time you actually made up your mind to make your permanent residence?

A. I would say a week or ten days after I arrived.

Q. In February, 1944, you reached the intention to make this your permanent home and residence and to remain for an indefinite period of time?

A. Yes.

Q. Since that time has there been any change in your intention?

A. None.

Q. Since February, 1944, have you had any other or different home than your home in Reno, Washoe County, Nevada?

A. I have not.

Q. Is that your present intention?

A. Yes.

Q. When you first came here, where did you go to reside?

A. I first lived at the El Cortez Hotel.

Q. What was that date?

A. February 30, 1944.

Q. How long did you remain there?

A. I stayed there until March 23, 1944.

Q. Then you went away on a business trip?

[fol. 75] A. I went on a business trip to San Francisco, California.

Q. How long were you gone?

A. For about three weeks.

Q. When did you come back?

A. Around April 19, 1944.

Q. You remained in Reno how long at that time?

A. I remained until May 16, 1944.

Q. Were you away from May 16, 1944, for a while?

A. I was away until October 15, 1944.

Q. Where did you go upon that occasion?

A. I went to Chicago and Newark, New Jersey.

Q. When did you return?

A. I returned to Nevada on October 15, 1944.

Q. Where did you go at that time?

A. I went to Las Vegas, Nevada.

Q. How long were you there?

A. I stayed there until November 2nd or 3rd, 1944.

Q. And then you came back to Reno?

A. Yes, on November 3, 1944.

Q. Where did you go to reside then?

A. To the El Cortez Hotel.

Q. How long did you remain there?

A. Until November 9, 1944.

Q. How did you happen to change your residence from there?

A. Due to wartime conditions it made it impossible for me to stay beyond six days.

Q. Then you went to the Hotel Wyn to reside?

A. Yes.

Q. And you have been staying there since?

A. Yes.

Q. For more than six weeks prior to April 17, 1945, were you here in Reno, Nevada, each and every day?

A. Yes, sir.

[fol. 76] Q. Prior to that time you had made occasional trips away?

A. Yes.

Q. While you were away, did you have your permanent residence here?

A. Yes.

Q. Are you registered to vote here in Nevada?

A. Yes.

Q. Do you have a bank account here in Nevada?

A. Yes.

Q. Do you have a bank account here in Nevada?

A. Yes.

Q. Do you have a safe deposit box here in Nevada?

A. Yes, sir.

Q. Is it still your intention to make your permanent home and residence in Nevada and remain for an indefinite period of time?

A. Yes, sir.

Q. Were you and the defendant married at Crown Point, Indiana?

A. That is right.

Q. Was that on the 20th day of July, 1937?

A. Yes.

Q. Are you still husband and wife?

A. Yes.

Q. Are there any children, the issue of the marriage?

A. None.

Q. Is there any community property belonging to you and the defendant in the State of Nevada or elsewhere?

A. None.

Q. The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance against you and in favor of the defendant; is that correct?

A. Yes, sir.

Q. That decree required you to pay \$180.00 per month for the defendant's support and maintenance?

A. Yes.

[fol. 77] Q. Have you been paying those payments?

A. Yes.

Q. And you are up to date on those payments?

A. Yes.

Q. You allege in the fifth paragraph of your complaint that for more than three consecutive years next preceding the filing of your complaint and since the 14th day of April, 1943, you and the defendant have lived separate and apart and without cohabitation. Is that true?

A. Yes.

Q. What brought about the separation?

A. Different reasons. One reason was there *were* no normal relationship between myself and my wife.

Q. She completely denied you the ordinary marital relations or any cohabitations; is that true?

A. Yes, sir.

Q. What sort of a disposition did she have?

A. Very disagreeable.

Q. Did she make a home for you?

A. No, sir.

Q. And you finally got tired of that and left; is that right?

A. Yes.

Q. Was that on April 14, 1942?

A. Yes, sir.

Q. Have you lived with or cohabited with her since that time?

A. No.

Q. Have you read all of the statements contained in your complaint for divorce?

A. Yes.

Q. Are they all true?

A. Yes.

Q. Is there any possibility of a reconciliation between you and the defendant?

A. Positively not.

[fol. 78] Mr. Smith: That is all.

The Court: That is all. You may be excused.

The Court: It is ordered, adjudged and decreed that the bonds of matrimony heretofore and now existing between the plaintiff and defendant be, and the same hereby are, dissolved, and each — said parties is restored to the status of a single person on the ground that said parties have lived separate and apart for more than three consecutive years, immediately preceding the filing of the complaint, without cohabitation.

The testimony will be transcribed and filed.

STATE OF NEVADA,
County of Washoe, ss:

I, J. A. CALLAHAN, official reporter pro tempore of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, Do Hereby Certify:

That as such reporter I was present in Department No. 1 of the above entitled court on Thursday, the 24th day of May, A. D. 1945, at the hour of 2:05 o'clock P. M. of said day, and that I then and there took verbatim shorthand notes of the testimony given and proceedings had therein and upon the trial of the case of Joseph Estin, plaintiff, vs. Gertrude Knudsen Estin, defendant.

That the foregoing transcript, consisting of pages numbered one (1) to twelve (12) inclusive, contains a full, true, and correct transcription of my said shorthand notes, so taken as aforesaid, and a full, true and correct statement of [fol. 79] the testimony given and proceedings had upon the trial of the said entitled action, to the best of my knowledge and ability.

Dated at Reno, Nevada, this 8th day of January, 1946.

J. A. Callahan.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WASHOE

No. 89547. Dept. No. 1

JOHN ESTIN, Plaintiff,

vs.

GERTRUDE KNUDSEN ESTIN, Defendant

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the originals thereof, and that I am the keeper of said originals, keeping same on file in my office as the legal custodian, and keeper of same under the laws of the State, and I further certify that the foregoing cop attached hereto are full, true and correct copies of the Judgment Roll consisting of the [fol. 80] following papers; Complaint, Affidavit for Publi-

cation of Summons Findings of Fact and Conclusions of Law and Decree together with Military Affidavit and Transcript of Testimony in Case No. 89547, and now on file and of record in my office.

I do further certify that the same have not been altered, amended or set aside, but are still full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 10th day of January, A. D. 1945.

E. H. Beemer, County Clerk.

Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing and attestation, ex-officio, Clerk of said Court.

That said signature is his genuine hand-writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is due form of law.

[fol. 81] Witness my hand this 10th day of January, A. D. 1946.

Wm. McKnight, One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

STATE OF NEVADA,

County of Washoe, ss:

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 10th day of January, A. D. 1946.

E. H. Beemer, County Clerk and ex-Officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

[fol. 82] EXHIBIT 1A, READ IN OPPOSITION TO PLAINTIFF'S MOTION .

E. H. Beemer, County Clerk, Washoe County Court House,
Reno, Nevada

I, E. H. Beemer, County Clerk and ex-officio registrar of voters, do hereby certify that Joseph Estin is an active, registered voter of Washoe County, State of Nevada.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of Washoe County this 7th day of January, 1946.

E. H. Beemer, County Clerk, by L. S. Wheeler, Deputy. (Seal.)

EXHIBIT 2, READ IN OPPOSITION TO PLAINTIFF'S MOTION

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

U. S. INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1944

or fiscal year beginning 1/1, 1944, and ending 1/1, 1945
Form 1040 1944
Treasury Department
Internal Revenue Service

[fol. 83] Employees—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than \$5,000, consisting wholly of wages shown on withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

Copy

Name: Joseph Estin. (Please Print. If this return is for a husband and wife, use both first names).

Address: 134 East Second Street. (Please Print. Street and number or rural route). (City or town, postal zone number): Reno. (State): Nevada. Social Security No. (if any): 093-07-2744.

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your Exemptions: Name (Please print).

Your name: Joseph Estin.

[fol. 84] EXHIBIT 3, READ IN OPPOSITION TO PLAINTIFF'S MOTION

File this return with Collector of Internal Revenue on or before March 15, 1946. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

U. S. Individual Income Tax Return for Calendar Year 1945 or fiscal year beginning 1945 and ending 1946

1945

Form 1040

Treasury Department, Internal Revenue Service

Employees—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends and interest.

Name: Joseph Estin. (Please Print. If this return is for a husband and wife, use both first names).

Address: 134 East Second Street. (Please Print. Street and number or rural route). (City or town, postal zone number): Reno. (State): Nevada.

Occupation: —.

Social Security No.: 093-01-2744.

[fol. 85] Your Exemptions:

List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

1. Name (please print) Relationship

Your name: Joseph Estin x x x x x

Enter your total wages, bonuses, commission, and other compensation received in 1945. Before pay-roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

2. Print Employer's Name: None.

Your Income: Enter total here  None

EXHIBIT 4, READ IN OPPOSITION TO PLAINTIFF'S MOTION
Declaration of Estimated Income Tax by Individuals
(Form 1040-ES)

Your Copy of Declaration of Estimated Tax
(Form 1040-ES)

1945

Name: Joseph Estin.

Copy these figures on the Declaration which you will file with the collector.

Keep this copy for use in making your Annual Return.

(Detach at this line.)

[fol. 86] Declaration of Estimated Tax

Name: Joseph Estin. (Please print. If this declaration is for a husband and wife, use both first names).

Social Security No., if any: 093-07-2744.

Address: 134 East 2nd Street. (Please print) (Street and number or rural route).

(City or town, zone number): Reno. (State): Nevada.

- | | |
|--|------|
| | 1945 |
| 1. Estimated Income Tax for 1945..... | None |
| 6. Unpaid balance of Estimated Tax (item 3
less the sum of items 4 and 5) | None |
| 7. Amount paid with this declaration. (Read
carefully Instructions 3 and 4) | None |

I declare under the penalties of perjury that this declaration has been examined by me and to the best of my knowledge and belief is a true, correct, and complete declaration.

— — —, (Signature of taxpayer or agent).

Dated Mar. 14, 1945.

[fol. 87] EXHIBIT 5, READ IN OPPOSITION TO PLAINTIFF'S
MOTION

(Poll Tax Receipt 1944)

No. 5250

County of Washoe, Nevada

1944

Nov. 8, 1944.

This Certifies, That Joseph Estin has paid Three Dollars
Poll Tax for the year 1944.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

EXHIBIT 6, READ IN OPPOSITION TO PLAINTIFF'S MOTION

(Poll Tax Receipt for 1945)

No. 1064

County of Washoe, Nevada

1945

Jan. 4, 1945.

This Certifies, That Joseph Estin has paid Three Dollars Poll Tax for the year 1945.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

[fol. 88] EXHIBIT 7, READ IN OPPOSITION TO PLAINTIFF'S MOTION

(Poll Tax Receipt for 1946)

No. 1305

County of Washoe, Nevada

1946

Jan. 9, 1946.

This Certifies, That Joseph Estin has paid Three Dollars Poll Tax for the year 1946.

Frank Campbell, County Assessor.

Delle B. Boyd, County Auditor.

EXHIBIT 8, READ IN OPPOSITION TO PLAINTIFF'S MOTION

No. 27707

Personal Property Tax Receipt for 1945

State of Nevada, County of Washoe. Assessed to Joseph Estin. Address: Hotel Wynn. County of Reno, Total, \$399.

[fol. 89]

Number	Description	Valuation	Tax
3375	Chry 41 Sedan	1200	47.88
Total		1200	47.88
1-4-1945			

Received of as above forty-seven & 88/100 Dollars, being the amount of State and County Taxes (both general and special) on the above-described property for the year ending December 31, 1945.

Frank Campbell, County Assessor. J. C., Deputy.

Delle B. Boyd, County Auditor.

EXHIBIT 9, READ IN OPPOSITION TO PLAINTIFF'S MOTION

No. 23407

Personal Property Tax Receipt for 1946

State of Nevada, County of Washoe. Assessed to Joseph Estin. Address: Hotel Wynn. County of Reno, Total \$424.
[fol. 90]

Number	Description	Valuation	Tax
1479	41 Chrysler Sed.	730	30.95
Total		730	30.95
1-9-1946			

Received of above thirty & 95/100 Dollars, being the amount of State and County Taxes (both general and special) on the above-described property for the year ending December 31, 1946.

Frank Campbell, County Assessor. J. C., Deputy.

Delle B. Boyd, County Auditor.

EXHIBIT 10, READ IN OPPOSITION TO PLAINTIFF'S MOTION

Office of County Assessor
 Washoe County, Nevada
 Motor Vehicle Department
 Frank Campbell, Assessor

Reno, Nevada, January 9, 1946.

TO WHOM IT MAY CONCERN :

This is to advise that Mr. Joseph Estin, of the Hotel Wynn, 134 East 2nd Street, Reno, Nevada, registered a [fol. 91] 1941 Chrysler 4 Door Sedan in 1944, receiving license #10-595, and paid a poll tax of \$3.00, receipt number 5250.

On January 4, 1945, he renewed his license, receiving license No. 3375, on said automobile, paying

License fee	\$ 5.00
Personal Property Tax	47.88
Poll Tax—Receipt No. 1064	3.00
	<hr/>
Total	\$55.88

On January 9, 1946 he again renewed his license on said car, receiving license number 1479, paying

License fee	\$ 5.00
Personal Property Tax	30.95
Poll Tax—Receipt No. 1305	3.00
	<hr/>
Total	\$38.95

Yours very truly, Frank Campbell.

FC:W.

Frank Campbell first being sworn, deposes and says that the above statement is true and correct to the best of his knowledge and belief.

Frank Campbell.

Subscribed and sworn to this 19th day of March, 1946. E. H. Beemer, County Clerk. (Seal.)

[fol. 92] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

REPLY AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO APRIL 12,
1946, READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:
City of New York,

Gertrude Estin, being duly sworn, deposes and says that she is the plaintiff herein, that she, by her attorney Roy Guthman, Esq., on February 20th, 1946, obtained an Order to Show Cause of the above entitled Court requiring her husband, the above named defendant, to show cause why an order should not be made directing the entry of judgment for the amount of \$1,620.00 arrears in the payment of sums of money, with interest, required to be paid by the defendant under the judgment of this Court in this action which is a separation action entered on October 13th, 1943, for the support and maintenance of the plaintiff, deponent; that the said judgment has not been modified or changed since its entry and is still in full force and effect as this deponent is informed and advised.

Deponent further says that some of the statements of fact contained in the affidavit of Joseph Estin, the defendant, verified March 19, 1946, and filed in opposition to the Order to Show Cause herein, are fal-acious and she further [fol. 93] deposes to establish the correct state of facts for the consideration of the Court.

In the concluding paragraphs on page #4 of the said affidavit of the defendant Joseph Estin reference is made to the stipulation agreement, dated March 16, 1943, which is Exhibit B attached to the moving papers herein and the original of which is among the filed papers herein attached to the Referee's Findings, which will be before the Court in its consideration of this motion; in the last paragraphs on page 4 of the defendant's said affidavit he states "Subsequently to the signing of this stipulation (Exhibit B) an action for separation was commenced by the plaintiff against me, and upon my default therein the matter was submitted by the Court to an Official Referee to hear and determine and to make findings of fact and conclusions of Law, which was done." The first line of the above quota-

tion is false and the defendant made it knowing that it is false and made it to mislead the Court.

This action was started by the personal service of the summons and complaint on the 5th day of February, 1943, as appears by the Original Summons and Complaint and affidavit of service which are among the filed papers before the Court. Defendant must have made such false statement knowingly, deliberately and with intention to mislead because in the second paragraph of said stipulation (Exhibit B), which the defendant must have had before him when he made his said affidavit of March 19th, 1946, it is stated, [fol. 94] "Whereas, the summons and complaint herein etc. were heretofore served upon the defendant on the 5th day of February, 1943." This flagrant false statement of the defendant Joseph Estin, under oath impeaches the veracity of the other statements in his said affidavit. When a witness is shown to have sworn falsely to a material statement in testifying in an action no faith or credit should be given to any of his testimony. Deponent further says that she is informed and verily believes that the above statement in analogous words is very frequently given to juries in charges by Courts in summing up.

Defendant made said statement to lead the Court to believe that the separation between plaintiff and defendant which lead up to this above entitled action occurred by mutual consent and agreement which culminated in the stipulation of March 16th, 1943, and that this above entitled action is a part of an amicable agreement and settlement.

The plaintiff commenced this action by reason of the abandonment of her and her home by her husband Joseph Estin, the defendant, and his cruel and inhuman treatment of her, because he openly kept company continually and entertained a neighbor woman, Hilma Fredzel Wood and committed adultery with her, all of which appears by the complaint filed herein and by the affidavit of the deponent verified February 1, 1943 and filed herein in connection with the motion for a temporary alimony and counsel fees, to which complaint and affidavit the deponent refers and makes a part hereof as if herein re-written.

[fol. 95] After said summons and complaint had been served on the defendant Joseph Estin, he became very much excited and distraught and declared that he would do everything possible to protect Hilma, as he called her, meaning Hilma Fredzell Wood, named in the complaint, from pub-

licity. It was then February 9th, 1943 that the defendant's attorney of record, Mitchell Salem Fisher, Esq., filed his notice of appearance herein but did not file an answer and at once commenced negotiations with the plaintiff's attorney which lead up to the agreement and stipulation of March 16th, 1943, and six weeks after the commencement of the action, for the consideration that at the hearing before the Official Referee no evidence of the defendant's adultery would be introduced.

The defendant's attorney of record, Mitchell Salem Fisher, Esq., wrote the contract stipulation (Exhibit B). To be sure the plaintiff's attorney took part in the negotiations which resulted in the drawing of the stipulation but the defendant's attorney drew it up and had it written in his office. Therefore the stipulation should be most strongly construed against the defendant.

The plaintiff was loath to sign the stipulation and she was finally persuaded that the agreement was drawn to protect her so that she finally did sign, and within three months after she signed and the contract, stipulation (Exhibit B) was executed the defendant and his attorney have done and said everything they could to make its provision [fol. 96] worthless and of no effect. The defendant's attorney, Mitchell Salem Fisher, not only drew and filed his Notice of Appearance herein on February 9th, 1943, and negotiated and drew the contract (Exhibit B) but he personally attended and was present at the hearing before the Official Referee although he did not take any part in said hearing. Could it be that he was present to make certain that he and his client received their consideration for the contract (Exhibit B), what the defendant considered the most important item, that his paramour, Hilma Fredzell Wood be protected from publicity?

Nothing was said at the hearing, no testimony was put in about the acts of adultery of the defendant.

As before stated the defendant received his consideration for the contract by the forbearance of the plaintiff's attorney from introducing testimony as to the defendant's acts of adultery or keeping company with Hilma Fredzell Wood; further in the 9th and last paragraphs of the stipulation (Exhibit B) it recites, "Whenever for the purpose of enforcing any right of the plaintiff under this stipulation or under any such decree, if entered it becomes necessary for the plaintiff to obtain the services of any process or paper

or notice of any kind upon the defendant, the defendant hereby appoints his attorney, Mitchell Salem Fisher, Esq., 30 Pine Street, New York City, as his agent and attorney in fact to receive the service of any such process or paper or notice of any kind whenever the defendant cannot, with [fol. 97] reasonable diligence, be found within the City of New York." This paragraph is part and parcel of the contract, the only paragraph which is of any value or consideration for the plaintiff. It constitutes a power of attorney irrevocable because based on a valuable consideration and therefrom coupled with an interest. Mr. Fisher signed and executed the contract as well as did the defendant Joseph Estin.

The defendant in his affidavit tries to make much of the fact that the referee in his findings and the Justice of the Court in his decree did not incorporate any of the provisions of the stipulation other than the provision for \$500.00 attorney's fees and \$180.00 per month for the maintenance and support of the plaintiff. He refers, of course, to the fact that there is left out of the findings and the decree any injunction or stay against the defendant going out of the State to obtain a divorce.

That provision the fifth paragraph of the stipulation (Exhibit B) is to the effect that the decree shall, subject to the approval of the Court, contain a provision "that the defendant be restrained and enjoined from leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff etc." Putting this clause into the stipulation by the defendant's attorney was a stroke of Machiavellian diplomacy. He knew, if he knows any law at all, that such agreement could not be given effect, as indeed it was not, because of the well established law followed by New York Courts that a person will not be enjoined from proceeding to obtain a divorce, until and unless among [fol. 98] other things he or she has done or is doing some overt act toward getting a divorce. Nothing like that was shown in this case in 1943 so the referee and the Justice declined to incorporate the provision. As deponent has stated she was loath to sign the stipulation and much was made of the aforesaid fifth paragraph to convince her that it was for her protection and advantage in finally persuading her to sign and execute the stipulation.

As to counsel fees asked for in addition to the counsel fees heretofore awarded and paid, deponent says they are asked

for the preparation and argument of the Order to Show Cause, for the preparation and argument of the opposition to defendant's cross motion to amend the judgment of this Court dated October 13th, 1943, by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance and for the enforcement of the judgment of the court and the collection of the amount of the judgment when and if rendered. The Court will undoubtedly take judicial notice of the contingent fee fixed by usage of lawyers and bar association rules for making collections either by settlement or legal process, to wit, 25% of the amount of money collected. If there is no judgment of course there will be no fee allowed for its collection. The Court, only, knows whether or not there will be a judgment, and it is not at all speculative.

The statement in the affidavit of George S. Wing, defendant's present counsel opposing this Order to Show Cause, [fol. 99] verified March 9th, 1946, in the last paragraph of which he deposes, "Furthermore the payment of any counsel fees, it is submitted, is excluded from consideration by the terms of the stipulation which the plaintiff makes a part of her moving papers upon this motion.

The only place in said stipulation (Exhibit B) in which reference is made to additional Counsel Fees in paragraph 4 of the stipulation in which it provides that in the event that the plaintiff at any time hereafter shall institute an action for divorce the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action."

The plaintiff has not and is not instituting an action for divorce against the defendant and the above paragraph does not apply to the demand for additional counsel fees to pay counsel to conduct these proceedings made necessary by the acts of the defendant seeking to break his said contract and to evade and avoid his obligations under the judgment and decree of this Court. The Order to Show Cause in the second paragraph thereof directs the defendant to show cause why the plaintiff should not have such other and further relief as to the Court may seem just and proper. [fol. 100] Deponent further says that the amount of

\$1,620.00 arrears in the payment of the sums of money required to be paid by the defendant has been increased by arrears for two more months, to wit, March and April, 1946, which the defendant has not paid. The order to Show Cause was returnable on March 15th, 1946, and because of the time required to procure affidavits and information from Nevada, has been adjourned from time to time by the stipulations of the attorneys to April 17th, 1946.

Wherefore, the plaintiff prays that an order be made herein directing the entry of a money judgment of \$1,980.00 arrears in the payment of the sums of money, with interest, required to be paid by the defendant under the judgment of this court made and entered on the 11th day of October, 1943, together with costs.

(Sworn to by Gertrude Estin, April 12, 1946.)

[fol. 101] IN SUPREME COURT OF NEW YORK, QUEENS
COUNTY

[Same Title]

REPLY AFFIDAVIT OF ROY GUTHMAN, SWORN TO APRIL 12,
1946, READ IN SUPPORT OF PLAINTIFF'S MOTION

STATE OF NEW YORK,
County of New York, ss:
City of New York,

ROY GUTHMAN, being duly sworn, says that he is an attorney-at-law and is the attorney for the above named plaintiff, that he has read the affidavits of the plaintiff, Gertrude Estin, verified April, 1946, and filed herein in connection with the motions for a money judgment and to modify or vacate the judgment of this Court in the above entitled action, and known the contents thereof; that in February and March, 1944, when he and the plaintiff went to the office of defendant's attorney, Mitchell Salem Fisher, Esq., at the latter's request to discuss a settlement of this case and judgment, the said attorney stated that the defendant Joseph Estin had gone to Reno, Nevada to secure a divorce and had the further conversation about the divorce as stated in Mrs. Estin's affidavit; that about two weeks later also in Mr. Fisher's office, the latter said that upon advice of

counsel, Mr. Estin would not sue for divorce in 1944 but would retain his domicile in Reno and return there in 1945, when he would have been separated from Mrs. Estin for [fol. 102] three years, and then start his action for divorce when the plea in bar of judgment of the Supreme Court of the State of New York, Queens County, entered on October 13th, 1943, would no longer be a good and valid defense under the Nevada Statute. Deponent has in his possession letters dated in April and May, 1944, from the law firm of Hawkins, Rhodes & Hawkins, a very reputable law firm of Reno, Nevada, in which the writer, Robert Z. Hawkins, Esq., states that Joseph Estin was in Reno and in consultation with his attorney, Lloyd V. Smith, about starting a divorce action against his wife, that Estin left Nevada in May, 1944, for parts unknown and without having commenced any divorce action.

Deponent further says that the one and only issue in this proceeding is one of law and not of fact, to wit, the effect of the Nevada divorce, the plaintiff says that she did not receive a copy of the decree of divorce said to have been granted by the Nevada Court on May 24th, 1945, and deponent believes that to be the fact. The defendant and his attorneys do not state that the time the decree was entered in Reno he, they or either of them sent the plaintiff a copy of the decree or any word about it. The copy attached to the defendant's motion papers herein is the first and only time plaintiff or deponent have seen the decree or have any knowledge of its contents and can therefore only technically deny it for the purpose of requiring its proof. The deponent states that in June 1945 he was informed by a letter from the above mentioned firm of lawyers in Reno, Hawkins, Rhodes & Hawkins, that in May 1945 a decree of divorce had [fol. 103] been entered in Reno, Nevada, in favor of Joseph Estin against Gertrude Estin, but did not receive any information of the contents of the decree or grounds for the divorce.

Deponent further says that in the third paragraph of the affidavit of George S. Wing one of defendant's counsel in making the motion to modify or vacate the judgment herein, verified March 25th, 1946, and attached to said motion papers, the affiant, George S. Wing states that the defendant (Joseph Estin) appears voluntarily in opposition to the motion for a money judgment and does not recognize the

Elity of the service upon the said attorney Mitchell Salem
ther, Esq. Deponent says that this present motion by
dplaintiff for a money judgment for the arrears of money
s her from the defendant for her support is the third
ah motion made by the plaintiff within the past two years
sl four months. In each of the two prior proceedings
tvice on the defendant was made, as directed by the Jus-
o of this Court in the Order to Show Cause, by service
h Mitchell Salem Fisher, Esq., his attorney of record
iein, as well as his attorney in fact. Each time such serv-
a was sufficient to bring the defendant into court by his
orney appearing for him. On the two former occasions
b defendant by his attorney paid the amount of arrears
sore the Order to Show Cause was argued, and on the
pond occasion, in April 1945 paid in addition \$100.00
tintiff's counsel fees and so recognized the justice of plain-
['s claim for additional counsel fees in these proceedings.
ol. 104] The defendant has not voluntarily appeared in
art at any time.

Service on the defendant herein by service on Mitchell
lem Fisher, Esq., is good and sufficient service in these
ceedings because of the well-established rule of Equity
at when a Court of Equity acquires jurisdiction of a de-
adant by the personal service of a summons and com-
aint upon him followed by his appearance in Court by an
torney of record and thereupon a judgment or decree of
fe Court is rendered, requiring the defendant to do or re-
tain from a certain act or acts in the future, and when after
te judgment has been rendered, the defendant disobeys
ce decree of the Court and fails to do the act or continues
r resumes doing the forbidden act or acts, the Court of
quity retains its jurisdiction of the person of the defendant
i that it may enforce its decree and service of the papers
the proceedings to enforce the decree on the defendant's
s attorney of record in the case is deemed sufficient service.
itt vs. Davison, 37 N. Y. 235, and Thayer vs. Thayer, 149
D. 268, and other cases cited in the brief of plaintiff's
torney, the deponent, in support of this motion for a money
dgment.

Wherefore the deponent respectfully asks for the plaintiff,
his client, that the motion for a money judgment for
\$1,980.00 be granted and that the defendant's motion to mod-
fy or vacate the Judgment of Separation herein be denied

with motion costs for each motion and for such other and further relief as to the Court may seem just and proper.

(Sworn to by Roy Guthman April 12, 1946.)

[fol. 105] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

NOTICE OF MOTION BY DEFENDANT TO MODIFY JUDGMENT

Please take notice that upon the annexed affidavit of Joseph Estin, sworn to the 19th day of March, 1946, and the exhibits thereto attached, the affidavit of Lloyd V. Smith, sworn to the 19th day of March, 1946, the affidavit of Marjorie DeVaul, sworn to the 1st day of March, 1946, and the affidavit of George S. Wing, sworn to the 25th day of March, 1946, the Order of this Court made the 11th day of October, 1943, referring this matter to the Official Referee, the Findings of Fact and Conclusions of Law made the 29th day of September, 1943, and the Judgment herein entered the 14th day of October, 1943, and upon the proceedings had herein, the defendant will move this Court at a Special Term, Part I thereof, to be held at the Queens County Court Building, Sutphin Boulevard, Jamaica, New York, on the 3rd day of April, 1946, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order amending the Judgment herein by striking therefrom all provisions for the payment of money by the defendant to the plaintiff for her support and maintenance, and for such other and further relief as may be just and proper.

These motion papers being served eight (8) days before [fol. 106] the return day, copies of answering affidavits are required to be served two (2) days before the return day of the motion.

Yours, etc., Wing & Wing, Attorneys for the Defendant,
225 Broadway, New York 7, N. Y.

Dated: March 25, 1946.

To: Gertrude Knudsen Estin, Plaintiff.

To: Roy Guthman, Esq., Attorney for the Plaintiff, 11 West 42nd Street, Borough of Manhattan, City of New York.

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JOSEPH ESTIN, SWORN TO MARCH 19, 1946, READ
IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

STATE OF NEVADA,
County of Washoe, ss:

Joseph Estin, being duly sworn, deposes and says:

I reside at Wyn Hotel, 134 East Second Street, Reno, Nevada, and am the defendant in the above entitled action, [fol. 107] which said action was brought by the plaintiff, my then wife, against me for separation upon the alleged ground of willful abandonment and for maintenance and support.

The plaintiff and myself were married on July 20, 1937, in the State of Indiana, and thereafter resided together as man and wife in Queens County until April 14, 1942. That since said time we have not cohabited and have lived apart.

This action was commenced by the service of a summons and complaint on the 5th day of February, 1943, and I appeared in the action by my attorney, Mitchell Salem Fisher, Esq., but no answer to the complaint was served by me and upon my default the matter was referred by the Court to Hon. James C. Van Sieten, Official Referee, to hear and determine and to make and submit to the Court findings of fact and conclusions of law. A hearing before the Official Referee was held on May 14, 1943, at which time testimony was offered by the plaintiff and a stipulation, which had been entered into between the plaintiff and myself on March 16, 1943, together with two other stipulations, dated respectively April 1, 1943, and April 12, 1943, modifying or supplementing the first stipulation were offered and received in evidence.

Thereafter proposed Findings of Fact and Conclusions of Law were submitted to the Official Referee, which proposed Findings of Fact and Conclusions of Law included all or many of the provisions contained in the aforesaid stipulations. The Referee struck out and declined to include in the Findings of Fact and Conclusions of Law made by him any of the provisions of the said stipulations, except that pertaining to the amount of the monthly payments for support and maintenance of the plaintiff.

On the 11th day of October, 1943, the Court by its Judgment confirmed, ratified and approved the report of the Official Referee and adjudged that the plaintiff, Gertrude Estin, be separated from the bed and board of the defendant, Joseph Estin, and that I pay to the plaintiff for her support and maintenance the sum of \$180.00 per month.

That in the month of January, 1944, having disposed of my interest in a business with which I was connected and in order to get away from the scene of my most unpleasant matrimonial experience and the annoyance of being followed and spied upon by private detectives and others at the instance of my wife, I decided to go to San Francisco, California, to live.

On my way to California, I stopped at Reno, Nevada, among other places, and being pleased with living conditions and believing that this would make a pleasant and satisfactory place in which to live, I decided to remain here and took up my residence at the Hotel El Cartez, where I continued to reside until November 9th, 1944. While residing at the Hotel El Cartez, I made a number of trips of relatively short duration, not exceeding two or three weeks, with the exception of a trip during the summer of 1944, when I went as far as Chicago and to Newark, New Jersey, for business reasons. On November 9th, 1944, I [fol. 109] moved from the Hotel El Cartez to the Wyn Hotel, 134 East Second Street, Reno, Nevada, where I have ever since continued to reside and am residing at the present time. I have maintained no other place of residence than the aforesaid since leaving New York in January, 1944.

I became a registered voter in Washoe County on March 28th, 1945, and have since said time voted in that county.

My United States Individual Income Tax Return, which was prepared and filed for the year 1944, gives as my address No. 134 East Second Street, Reno, Nevada, and such return prepared and filed for the year 1945, likewise gives the same address. On March 14, 1945, I prepared and filed a declaration of estimated income, therein stating my address to be No. 134 East Second Street, Reno, Nevada. True and correct photostatic copies of the headings of the aforementioned tax returns and of the declaration of estimated income are attached hereto, made a part hereof, and marked Exhibits 2, 3 and 4.

On the 8th day of November, 1944, I paid my poll tax for said year, and on January 4, 1945, I paid my poll tax then

due and again on January 9, 1946. Receipts for said poll taxes so paid by me are hereto attached and made a part hereof and marked Exhibits 5, 6 and 7.

On January 4, 1945, I paid my personal property tax based on the ownership of my automobile and again on January 9, 1946, I paid said tax, in each instance receiving receipts therefor, photostatic copies of which are hereto [fol. 110] attached and made a part hereof and marked Exhibits 8 and 9 respectively.

In the year 1944, as a resident of the State of Nevada, I was issued automobile owner's license No. 10595, and on January 4, 1945, I was issued automobile license No. 3375 for the year 1945 and again on January 9, 1946, I was issued automobile license No. 1479 for the year 1946. Attached hereto is a statement from the County Assessor of Washoe County, Motor Vehicle Department, certifying to the aforesaid information respecting the issuance of the aforementioned automobile owner's licenses, and marked Exhibit 10.

After having taken up my residence in Reno, Nevada, through my attorney, Mitchell Salem Fisher, in New York, I endeavored to consummate a settlement with my then wife in the hope and belief that she might take steps to obtain a divorce. These efforts proved futile, due largely, as I believe, to the erroneous ideas of my then wife and her attorney as to my material worth.

In April 1945, after having resided in Reno, State of Nevada, for approximately 15 months, I commenced an action against my then wife, causing service of process to be made upon her by publication and in pursuance to the provisions of the laws of the State of Nevada. There being no appearance in said action by my then wife and upon her default, the case came on for hearing and after such hearing a judgment of absolute divorce was granted in my favor and against my then wife, the plaintiff herein, as of May 24th, 1945. An exemplified copy of the complete proceedings in the Nevada Court is hereto attached and marked "Exhibit 1."

I did not leave the State of New York with the intent or for the purpose of commencing an action for divorce against my then wife, nor did I take up my residence in the State of Nevada for that purpose. When I first established my residence in the State of Nevada, it was my intention to make same my permanent place of residence. I have

been a continuous resident of the State of Nevada, enjoying the privileges of a citizen of that state, for approximately 27 months. The fact that I have resided at hotels during this period has been from necessity, owing to the housing shortage, rather than from choice. It has been and is my intention to acquire and maintain a private place of residence as soon as the housing emergency and the dearth of living quarters make this possible.

As of May 24th, 1945, under the judgment of a court of competent jurisdiction of the State of Nevada, where such judgment was obtained in full compliance with the laws of that state in an action brought by me as a resident of that state in good faith and without subterfuge, the relationship of husband and wife as between the plaintiff herein and myself was legally terminated.

Under the established rule that full faith and credit shall be given by one state to the laws and decisions of another state, the judgment of the State of Nevada terminating the relationship of husband and wife supersedes the judgment for separation in the above entitled action.

[fol. 112] Wherefore, it is respectfully asked that an order be made vacating and setting aside the judgment in the above entitled action as of the 24th day of May, 1945, the date upon which the judgment of divorce was granted by the Nevada Court, and for such other and further relief as to the Court may seem just and proper.

Joseph Estin.

Sworn to before me this 19th day of March, 1946.

Lloyd V. Smith. (Seal.)

(Notarial Certificate of the Clerk of Washoe Co., Nevada.)

AFFIDAVIT OF LLOYD V. SMITH, READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

(Printed in full herein at pages 46 to 48.)

AFFIDAVIT OF MARJORIE DeVaul, READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

(Printed in full herein at page 49.)

[fol. 113] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GEORGE S. WING, SWORN TO MARCH 25, 1946,
READ IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY
JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

GEORGE S. WING, being duly sworn, deposes and says that I am an Attorney at Law, and one of the attorneys for the defendant herein.

The defendant herein, simultaneously with the return of an Order to Show Cause made by the plaintiff seeking a judgment for alimony, makes this Motion to modify the Judgment of Separation by striking therefrom all provision for the payment of alimony as and after May 24th, 1945, the date upon which the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, granted to the defendant a Decree of Divorce.

I have read the affidavit of Gertrude Estin and the Stipulations and Judgment of Separation submitted in support of the aforesaid motion for unpaid alimony. Said motion is brought by the service of the Order to Show Cause and Affidavits upon Mitchell Salem Fisher, Esq., as the alleged agent or attorney-in-fact of the defendant. The defendant appears voluntarily in opposition to that motion and does not recognize the legality of the service upon the alleged agent or attorney-in-fact, inasmuch as the designation of the said agent or attorney-in-fact, under the stipulation [fol. 114] respecting the same, was terminated by the refusal of the Court to incorporate provision therefor in the Decree of Separation, and any designation of such agent or attorney-in-fact thereupon became null and void.

All amounts of alimony accruing under the said Judgment of Separation prior to the date of the Nevada divorce, to wit, May 24th, 1945, have been paid, as appears from the affidavit of Gertrude Estin.

This Notice of Motion and attached affidavits are served eight (8) days before the return day of the motion to be made thereon, and Answering Affidavits intended for use in opposition to this motion must be served upon the attor-

neys for the defendant not less than two (2) days before the motion is returnable.

Wherefore, the defendant respectfully asks that the Judgment of Separation herein be set aside or modified by striking therefrom all provision made therein for the payment of alimony to the plaintiff by the defendant, and for such other and further relief as to the Court may seem just and proper.

(Sworn to by George S. Wing, March 25, 1946.)

[fol. 115] EXHIBIT 1, READ IN SUPPORT OF DEFENDANT'S
MOTION TO MODIFY JUDGMENT

(Printed herein at pages 50 to 81.)

EXHIBIT 1A, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 82.)

EXHIBIT 2, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 82 to 83.)

EXHIBIT 3, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 84 to 85.)

EXHIBIT 4, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 85 to 86.)

EXHIBIT 5, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 87.)

[fol. 116] EXHIBIT 6, READ IN SUPPORT OF DEFENDANT'S
MOTION TO MODIFY JUDGMENT

(Printed herein at page 87.)

EXHIBIT 7, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at page 88.)

EXHIBIT 8, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 88 to 89.)

EXHIBIT 9, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 89 to 90.)

EXHIBIT 10, READ IN SUPPORT OF DEFENDANT'S MOTION TO
MODIFY JUDGMENT

(Printed herein at pages 90 to 91.)

[fol. 117] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF GERTRUDE ESTIN, SWORN TO APRIL 12, 1946,
READ IN OPPOSITION TO DEFENDANT'S MOTION TO MODIFY
JUDGMENT

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Gertrude Estin, being duly sworn, deposes and says that she is the plaintiff in the above entitled action and makes this affidavit in reply to the affidavit of her husband, Joseph Estin, the above named defendant, verified March 19th, 1946, and attached to the motion papers of the defendant's motion to modify or vacate the judgment of this Court in this action entered herein on October 13th, 1943.

Deponent refers to and repeats the language of the affidavit verified by her on the — day of April, 1946, in this same action in connection with an application for a money judgment for arrears of the sums of money the defendant is ordered by the Judgment of this Court entered herein on October 13th, 1943, to pay for her maintenance and support and makes said affidavit a part of this affidavit as if here rewritten.

As is stated in the affidavit of George S. Wing, counsel to the defendant, in making this motion herein and in opposing the application of the plaintiff for a money [fol. 118] judgment, verified March 29th, 1946, and attached to the papers filed herein in opposition to the plaintiff's said application, the affidavits and exhibits attached to the papers and used in support of the defendant's motion to modify or vacate the judgment and in support of and in opposition to the plaintiff's application for a money judgment are with slight exceptions the same. The main point at issue in both motions is one of law, to wit: Does the purported decree of divorce which the defendant obtained by default in Reno, Nevada, on May 24th, 1945, supersede the judgment of the Supreme Court of the State of New York, Queens County, entered herein on October 13th, 1943, and put an end to the defendant's obligations to pay to the plaintiff the sums of money which

that judgment orders him to pay to the plaintiff for her maintenance and support.

Nevertheless because there are statements in defendant's said affidavit which attack the good character of the deponent, she makes a denial of them here and begs the indulgence of the Court to hear her.

Notwithstanding the statement in defendant's said affidavit in the second paragraph on page 5 thereof that he did not go to the State of Nevada for the purpose of getting a divorce, it is a fact and deponent solemnly states that in January, 1944, before he left New York, defendant asked her to give him a divorce. "On January 8, 1944, my husband asked me to divorce him, though he knew from the inception that I would not and he knew why. I told him I would not go to Reno, but he said, 'It could be [fol. 119] arranged.' I told him no. He then said he would fight me, and that he was leaving town. I would not agree to a divorce because of Mrs. Wood's presence in the matter."

That in February, 1944, the defendant's New York attorney, Mitchell Salem Fisher, Esq., asked that the defendant and her attorney, Roy Guthman, meet him at his then office at 30 Pine Street, Manhattan, New York City, to discuss a cash settlement and disposition of the judgment of this Court of October 13th, 1943; that the said attorney Fisher for his client, the defendant herein offered to pay to the plaintiff the lump sum of \$5,000.00 in full settlement, discharge satisfaction and release of said judgment, provided that the deponent would enter her appearance by attorney in an action for divorce which the defendant was about to commence in Reno, and would agree not to oppose or contest such action; that the defendant had gone there for the purpose of getting a divorce and had engaged Lloyd V. Smith, Esq., an attorney there, to whom the defendant had been referred by his New York attorney, the said Mitchell Salem Fisher, Esq.

The plaintiff, deponent, refused the offer because insufficient, and said that if the offer was made sufficiently large she might consider it. Plaintiff's attorney, Roy Guthman, Esq., then said to Mr. Fisher that he believed that a successful defense could be interposed in any divorce action Joseph Estin might start in Nevada that year, that the judgment of this Court in this separation action would be a prevailing plea in bar to any complaint

[fol. 120] Joseph Estin might file based on a two-year separation and cited the Nevada decision, *Vickers vs. Vickers*, 45 Nevada 274; 202 Pacific 31, decided in 1921. Mr. Fisher asked me to consider his offer, which I promised to do, and promised to see him again in about two weeks. Early in March, 1944, again at Mr. Fisher's request, in company with my said attorney, Roy Guthman, I went again to Mr. Fisher's office. He repeated his cash offer and stated that the amount he stated was not final, but that if I would indicate that I would make some kind of settlement he would try to get a better offer from his client. I stated that I would not submit myself to the jurisdiction of a Nevada Court so that Joseph Estin could get a divorce. Mr. Guthman asked Mr. Fisher's opinion of the case of *Vickers vs. Vickers*, mentioned above, as a precedent which would stop defendant's efforts to get a divorce in Nevada. Mr. Fisher stated that the defendant on advice of Nevada counsel was not going to sue for divorce that year; that he had established his domicile there by six weeks' residence, under the Nevada statute; that he would retain and maintain that domicile there and return in a year and sue for a divorce on the grounds of a three-year separation, that since the decision of the *Vickers* case in 1921, the Nevada Legislature had added a statute to the effect that where spouses have been separated for three years or more and there is no chance of a reconciliation and their living together again, the Court shall grant a divorce in spite of any pleas in bar which might be introduced.

[fol. 121] Deponent further says that Mitchell Salem Fisher, Esq., is a brilliant lawyer of excellent reputation at the New York bar and she believes him when he says that her husband went to Nevada in January, 1944, and engaged Lloyd V. Smith, Esq., on his recommendation for the purpose of getting a divorce from the deponent as soon as may be.

Deponent further says that she and the defendant resided in New York City in the State of New York for about 15 years before their marriage in 1937 and both resided in Queens County in New York State from the date of their marriage until their separation in April, 1942, and lived apart, but continuously in New York State, until a month after the judgment of separation in this case on October 13th, 1943. The plaintiff has continued to live in New

York City, State of New York, since, but the defendant left New York City and State in November or December of 1943.

Their continued residence in New York for fifteen years, together with five years' residence together as man and wife in Queens County, and the judgment of this Court in October, 1943, definitely established the marital domicile of the plaintiff and defendant in Queens County, New York State. The defendant could not carry that domicile around in his pocket and take it to Reno, Nevada, and conveniently leave it resting there in a hotel for a year while he made extended trips to San Francisco, Calif., Chicago, Ill., Newark, N. J., and other way points, as defendant recites in his affidavits. After the judgment [fol. 122] of this Court in October, 1943, the marital domicile no longer followed the person of the defendant, the husband, and remained that of the wife, the plaintiff, who has continuously remained in New York.

In November, 1943, Hilma Fredzel Wood, the woman with whom it is charged in plaintiff's complaint herein the defendant misconducted himself, went to Chicago with her sister, who was ill, and went to Chicago for an operation. Mrs. Wood and her sister stayed at the Hotel Wellington Arms in Chicago.

That the defendant, Joseph Estin, went to Chicago with or about the same time as Hilma Fredzell Wood and stayed at the same hotel, The Wellington Arms; plaintiff's attorney, Roy Guthman, Esq., has in his possession a letter from Robert Greene, the manager of the Wellington Arms Hotel, dated December 7th, 1943, in which the said manager writes that Joseph Estin "has been a guest of ours since November 10th, last"; upon information received through my attorney from Milton Solomon, Esq., of 165 Broadway, Manhattan, New York City, Mrs. Wood's attorney, Mrs. Wood left Chicago at the end of January or the first of February, 1944, and went to Reno, Nevada, to establish a domicile for the purpose of obtaining a divorce, and upon Mr. Solomon's recommendation and introduction retained Lloyd V. Smith, Esq., the same Reno attorney who represented the defendant, Joseph Estin, in suing for divorce in Reno, Nevada. Mrs. Wood did get her divorce from her husband in Reno on March 20th, 1944, and left that same [fol. 123] evening to return to New York. Mr. Joseph Estin was in Reno, Nevada, with Mrs. Wood, as deponent is

informed by a letter dated March 25th, 1944, in the possession of plaintiff's said attorney from the law firm of Hawkins, Rhodes & Hawkins of Reno, Nevada. Deponent is informed that the Robert Hawkins who signed the letter for the firm is or was a non-resident member of the Bar Association of the City of New York.

In a letter from the same law firm dated May 23rd, 1944, the writer, Robert Z. Hawkins, states that the defendant, Joseph Estin, had left Nevada and his sources of information were uncertain as to whether or not he planned to return, nor was he able to learn where the defendant went.

In a letter from the aforementioned law firm dated April 21, 1944, Mr. Robert Z. Hawkins writes, "Supplementing my letter of April 5th, I understand that Mr. Smith (meaning Lloyd V. Smith, Esq.) has been contacted by Mr. Estin and Mr. Smith may file suit for Mr. Estin in the near future." He did not start the action until a year later, probably for the reasons hereinbefore stated. There is no doubt but that Joseph Estin went to Reno, Nevada, for the purpose of suing for divorce and only stayed there continuously for the six weeks required by the Nevada Statute in 1944 and again in 1945.

Of the three years' separation mentioned in the defendant's purported divorce decree attached to his moving papers, one-half of that time, eighteen months, is the legal [fol. 124] separation decreed by the judgment of this Court in October, 1943, and did not give the Nevada Court or any other Court jurisdiction to decree a divorce because of such legal separation and so render of no effect the judgment of this New York Court.

The defendant on the 5th page of his affidavit asks that full faith and credit be given to the judgment and decree of divorce of the Nevada Court of May 24th, 1945. Like charity, full faith and credit should begin at home.

(Sworn to by Gertrude Estin, April 12, 1946.)

IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

[Same Title]

AFFIDAVIT OF JAMES G. PURDY, SWORN TO APRIL 16, 1946,
 READ IN OPPOSITION TO PLAINTIFF'S MOTION AND IN SUP-
 PORT OF DEFENDANT'S MOTION TO MODIFY JUDGMENT

STATE OF NEW YORK,
 County of New York, ss:

James G. Purdy, being duly sworn, deposes and says:

I am a member of the firm of Wing & Wing, the attorneys
 for the defendant herein, and submit this affidavit in con-
 [fol. 125] nection with each of the motions herein.

I have read the replying affidavits on plaintiff's motion
 and the answering affidavits on defendant's motion, and
 hereby call the attention of the Court to the scandalous and
 impertinent matter contained in the two affidavits of the
 plaintiff, in which she charges, *without submitting any*
facts in support of those charges, that Mr. Estin com-
 mitted adultery with a neighbor, and that this was one
 of the causes of this action. Those unsupported charges
 have no relevancy to the merits of the present motions,
 are simply dirt and filth, which have no place herein. As
 such they are unworthy of any consideration, except that
 the affidavits in which they are contained should be sup-
 pressed.

Submitted herewith is a brief on which this matter is con-
 sidered in detail.

I, therefore, respectfully ask that the affidavits of Ger-
 trude Estin, each verified the 12th day of April, 1946, be
 suppressed, or in the alternative, that the scandalous and
 impertinent portions thereof be stricken therefrom, and
 that the defendant may have such other relief in the premises
 as may be just.

(Sworn to by James G. Purdy, April 16, 1946.)

[fol. 126] IN SUPREME COURT OF NEW YORK, SPECIAL TERM,
PART I

DECISION

By MR. JUSTICE HALLINAN:

Estin v. Estin—The plaintiff, in whose favor a judgment of separation was duly rendered in this court on October 11, 1943, applies, pursuant to Section 1171-b of the Civil Practice Act, for an order directing the entry of judgment for the amount of arrears, with interest, required to be paid by the defendant under the provisions of such judgment, and for a counsel fee. By a separate motion, the defendant moves, pursuant to Section 1170 of the Civil Practice, for an order to modify the aforesaid separation decree by striking therefrom all provisions for the payment of money by him to the plaintiff for her support and maintenance, upon the ground that he obtained a decree of divorce in the State of Nevada on May 24, 1945, and that as of that day, he ceased to be liable for any future alimony payments for the plaintiff's maintenance and support.

The parties hereto married in Indiana on July 20, 1937.

They took up their residence in Queens County, State of New York, where they lived until April, 1942, at which time they separated. Plaintiff commenced an action for a separation on February 5, 1943, upon the ground that in the month of April, 1942, the defendant wilfully abandoned her. The defendant appeared generally by his attorney, who served a notice of appearance on February 10, 1943, but interposed no answer or otherwise contested the action. By an order of this court dated May 3, 1943, on notice to the defendant's then attorney, the plaintiff's application for judgment was duly referred to an official referee to hear and report to the court. Upon an inquest taken before the official referee on May 14, 1943, the attorney representing the defendant appeared in his behalf. At that time the plaintiff testified that the defendant abandoned her in the month of April, 1942, and never returned to their joint home. A stipulation theretofore duly executed by the parties and their attorneys was received in evidence and referred to in the record as providing, among other things, for the payment of alimony

to the plaintiff in the sum of \$180 per month, commencing March 1, 1943. On September 29, 1943, the learned official referee rendered his formal report, stating his findings of fact and conclusions of law to be as follows: "Findings of fact—1. That the plaintiff and the defendant were married on the 20th day of July, 1937, at Crown Point, Indiana. 2. That the plaintiff and the defendant at all times hereinafter mentioned, and at the time of the commencement of this action were and still are residents of the City and State of New York. 3. That in the month of April, 1942, the defendant wilfully abandoned the plaintiff and left the home maintained by the parties hereto at 40-45 Hampton Street, Elmhurst, Queens County, New York, without justification and without intention of returning. 4. That there is no issue of the marriage of the parties. 5. That the plaintiff and the defendant have entered into a separation agreement date March 16, 1943, as amended by a stipulation dated April 1, 1943, and further amended by a letter dated April 12, 1943, all of which have been received in evidence as one exhibit, marked Plaintiff's Exhibit 1. 6. That the defendant should pay to the plaintiff for her support and maintenance the sum of one hundred and eighty (\$180) dollars per month." Conclusions of law—"1. The plaintiff is entitled to a final judgment in her favor and against the defendant separating the plaintiff from the bed and board of the defendant forever because of the wilful abandonment of the plaintiff by the defendant. 2. The final judgment in favor of the plaintiff and against the defendant shall provide: (a) That the defendant pay to the plaintiff for her support and maintenance the sum of One Hundred and Eighty (\$180) Dollars per month."

The foregoing findings were included in the proposed counterfindings of fact and conclusions of law which the defendant's attorney submitted to the official referee with the consent of the attorney for the plaintiff indorsed thereon.

On October 11, 1943, this court, on motion of the defendant's said attorney, signed the judgment, with notice of settlement, submitted by said attorney. Therein the report of the official referee was duly confirmed, ratified and approved in all respects, and it was "Adjudged that the plaintiff, Gertrude Estin, be and she hereby is separated from the bed and board of the defendant, Joseph Estin, because of the wilful abandonment of said plaintiff by said

defendant, and it is further ordered, adjudged and decreed that the defendant, Joseph Estin, pay to the plaintiff, Gertrude Estin, for her support and maintenance, the sum of \$180 per month."

[fol. 129] According to the defendant, having disposed of his interest in a business with which he was connected and in order to get away from the scene of his "most unpleasant matrimonial experience," he decided in January, 1944, to go to California to live. On his way, however, he stopped in Reno, Nevada, among other places "and being pleased with living conditions and believing that this would be a pleasant and satisfactory place in which to live * * * decided to remain here" and took up his residence at the Hotel El Cortez in Reno, Nevada, where he continued to reside until November 9, 1944, with the exception of a number of trips of relatively short duration to other parts of the country for business reasons. On November 9, 1944, he moved to the Wynn Hotel in Reno, Nevada, where he has ever since continued to reside and where he is residing at the present time.

On April 17, 1945, some fifteen months after his arrival in Reno, Nevada, the defendant commenced an action for divorce against his wife, the plaintiff herein. Process was served upon her by publication pursuant to the provisions of the laws of the State of Nevada. The plaintiff did not appear in said action and upon her default, a judgment of absolute divorce was granted against her on May 24, 1945. In his complaint against the plaintiff herein, he made the following allegations in support of his prayer for a divorce: "IV. That there is no community property belonging to the plaintiff and the defendant in the State of Nevada, or elsewhere. The Supreme Court in and for the State of New York, County of Queens, did, on the 14th day of October, 1943, in an uncontested action, enter a decree of [fol. 130] separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof. V. That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation."

In the findings of fact and conclusions of law filed on May 24, 1945, the court found, in part, as follows: "IV. That there is no community property belonging to the plaintiff and the defendant in the State of Nevada or elsewhere. The Supreme Court in and for the State of New York, County of Queens, did on the 14th day of October, 1943, in an uncontested action, enter a decree of separate maintenance in favor of the defendant herein and against plaintiff herein, awarding to the defendant the sum of One Hundred Eighty and no/100 (\$180.00) Dollars per month for support and maintenance. That plaintiff herein has at all times since the entry of the decree complied with the terms thereof. That said New York Supreme Court Judgment is not res adjudicata of the matters alleged in plaintiff's complaint. V. That for more than three consecutive years next preceding the filing of the complaint herein and since the 14th day of April, 1942, the plaintiff and defendant have lived separate and apart without cohabitation," and directed judgment for an absolute divorce "on the ground that the [fol. 131] parties have lived separate and apart for a period of more than three consecutive years, without cohabitation." The decree of divorce was filed the same date. The transcript of the minutes of the inquest taken in the Nevada action on May 24, 1945, shows that the defendant herein testified that this court did on October 14, 1943, enter a decree "of separate maintenance" against him, which provided for the payment of alimony in the sum of \$180 per month, which he had paid up to the date of the said hearing. He then gave the following testimony: "Q. You allege in the fifth paragraph of your complaint that for more than three consecutive years next preceding the filing of your complaint and since the 14th day of April, 1942, you and the defendant have lived separate and apart and without cohabitation. Is that true? A. Yes. Q. What brought about the separation? A. Different reasons. One reason was there were no normal relationships between myself and my wife. Q. She completely denied you the ordinary marital relations or any cohabitation; is that true? A. Yes, sir. Q. What sort of a disposition did she have? A. Very disagreeable. Q. Did she make a home for you? A. No, sir. Q. And you finally got tired of that and left; is that right? A. Yes. Q. Was that on April 14, 1942? A. Yes, sir. Have you lived with or cohabited with her since that time? A. No."

There is presented for determination by this court two broad issues: (1) Did the defendant acquire a bona fide domicile in Nevada, thereby conferring jurisdiction on its courts to render the judgment of divorce? (2) Did that judgment supersede the prior separation decree which the [fol. 132] plaintiff obtained in New York State and terminate the defendant's liability to pay the alimony therein provided?

In December, 1942, the United States Supreme Court in *Williams v. North Carolina* (317 U. S. 287, 63 S. Ct. 207, 143 A. L. R. 1273) held that "when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter." The New York Court of Appeals in November, 1943, handed down its decision *In re Holmes* (291 N. Y. 261) and held that a foreign judgment of divorce "will be given full force and effect as a judgment in rem. dissolving the marriage of the plaintiff until impeached by evidence which establishes that the court had no jurisdiction over the res." Subsequently on May 21, 1945, the Supreme Court of the United States handed down its second decision in the *Williams* case (*Williams v. North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 157 A. L. R. 1366) and there held that the domicile of one spouse within a state gave power to that state to dissolve a marriage wheresoever contracted, "but only if the Court of the first state had power to pass on the merits—had jurisdiction, that is to render judgment"; that in short, "the decree of divorce is a conclusive adjudication of everything except the *jurisdictional facts upon which it is founded and domicile is a jurisdictional fact*" (italics supplied). [fol. 133] If the determination which must be here made were to turn solely upon the question whether the defendant's judgment of divorce was bottomed upon a bona fide domicile in the State of Nevada there would be no difficulty in view of the foregoing authorities.

According to the defendant he has, since January 1944, maintained no other place of residence than in Reno, Nevada. He became a registered voter in Washoe County, Nevada, on March 28, 1945, and since said time has voted

in said county. His federal income tax returns for the years 1944 and 1945 indicate his residence there. He paid the poll tax in the County of Washoe, Nevada, for the years 1944, 1945 and 1946. In January, 1945, and again in January, 1946, he paid a personal property tax to the said county. In 1944, and again in 1945, the defendant registered his automobile in the State of Nevada, and in 1946 he renewed his license on said car.

From the foregoing facts there seems to be no doubt that the defendant is now and since January, 1944, has been a bona fide resident of the State of Nevada and there is no evidence of any probative force in the record which would indicate anything to the contrary. The plaintiff urges, however, that the separation judgment rendered by this court was an absolute bar to the District Court of Nevada assuming jurisdiction over the matrimonial res of the parties and rendering a judgment of divorce against her, in the absence of her appearance therein.

There is much that can be said for this view. This court had jurisdiction of the marital res and of the parties thereto [fol. 134] when it rendered a judgment of separation in favor of the plaintiff against the defendant because of his abandonment in April, 1942. The plaintiff remained in New York, but the defendant soon thereafter established a new domicile in the State of Nevada. Since their separation was under a decree of this court which had jurisdiction of the parties and of the subject-matter, the plaintiff's domicile remained in New York, notwithstanding the new domicile acquired by the husband in Nevada. In such circumstances, the Appellate Division of this department indicated in October, 1943, that: "the wife having prevailed in the separation action because of the husband's fault, the matrimonial res remained with the wife in New York and the wrongdoer is disabled from moving the res out of New York so as to give jurisdiction thereof in any other State, in the absence of an appearance by the wife" (*Gibson v. Gibson*, Appeal No. 2, 266 App. Div. 975, 44 N. Y. S. 2d 372). An examination of the record on appeal in the *Gibson* case indicates, however, that the wife, who had obtained a decree of separation in this court, sought an allowance of counsel fees to enable her to defend an action for a declaratory judgment which her husband brought in the Supreme Court, New York County, to declare that a judgment of divorce which he obtained in a sister state, superseded the pre-

existing separation decree and absolved him from the necessity of supporting his wife.

Thereafter in *Canle v. Canle* (52 N. Y. S. 2d 618, not otherwise reported) Mr. Justice Hooley held, on the authority of the Gibson case (*supra*), that a foreign state court's decree [fol. 135] of divorce in favor of a husband, without appearance by the wife, did not bar sequestration of his property by the wife to assure continued payments of alimony awarded in the previous judgment of separation until the divorce decree has been successfully established in this court. The defendant in that case then moved for an order relieving him of making payments of alimony under the provisions of the judgment of separation. The matter came on before Mr. Justice Ughetta (52 N. Y. S. 2d 620, not otherwise reported). It was there held that the husband had not presented facts sufficient to establish the jurisdictional efficacy of the divorce obtained by him in the sister state and accordingly his motion was denied.

Thus the foregoing decisions establish the principle that until the divorce decree rendered in the sister state in favor of the husband has been successfully established in the courts of this state, which duly rendered the prior separation judgment in favor of the wife, such separation judgment is not affected or automatically set aside by such divorce decree. This is in accord with the holdings of the federal courts in *Durlacher v. Durlacher* (123 F. 2d 70), and *Bassett v. Bassett* (141 F. 2d 954, certiorari denied, 323 U. S. 718).

Inasmuch as the United States Supreme Court, in the first Williams case, banished the doctrine of "matrimonial domiciles" from consideration and held that bona fide domicile of one spouse within a state gave the power to that state to dissolve a marriage wheresoever contracted, the plaintiff's rights, if any, must be founded on a different principle than [fol. 136] the dictum enunciated in the Gibson case (*supra*).

In the stipulation executed by the parties herein and their attorneys on March 16, 1943, which was adverted to in the fifth finding of fact contained in the report of the official referee of this court, dated September 29, 1943, it was provided, in part, as follows: "1. In the event that a judgment or decree of separation is entered herein, in favor of the plaintiff and against the defendant, that said decree shall provide, subject to the approval of the court: (a) That the defendant shall pay to the plaintiff the sum of \$180.00 per month as alimony for the support and maintenance of the

plaintiff herein. (b) That the defendant shall pay the sum of \$500.00 as the reasonable counsel fee of Edwin C. Morsch, attorney for the plaintiff for his services herein. 2. That the aforesaid sum of \$180 per month permanent alimony shall commence as of the first day of March, 1943. 3. That the aforesaid sum of \$500 counsel fee shall be paid simultaneously with the signing of this stipulation. 4. In the event that the plaintiff herein at any time hereafter shall institute an action for divorce, the plaintiff hereby agrees that she will not ask for or demand any sum of alimony which shall be greater than the amount herein provided for such purpose and the plaintiff agrees further that in any such action, she will not ask for or demand the payment of any counsel fee by the defendant for the services of any attorney engaged by the plaintiff to institute any such divorce action. 5. That the defendant hereby consents that if such decree of separation is entered herein, it shall contain a provision, subject to the approval of the court: that the [fol. 137] defendant be restrained and enjoined for leaving the State of New York for the purpose of instituting any action for divorce from the plaintiff, in any other State or foreign country, and enjoining and restraining the defendant from thereupon instituting any such action for divorce against the plaintiff in any such jurisdiction other than the State of New York, except that the foregoing shall not apply in the event that the plaintiff shall establish her residence outside of the State of New York."

Although the official referee struck from the proposed counterfindings of fact and conclusions of law presented by the defendant's then attorney all provisions of said stipulation, as well as the supplemental stipulations dated April 1 and 12, 1943, incorporated therein, with the exception of the provision for the payment of maintenance in the sum of \$180 per month, it is clear that the support and maintenance which was provided in the decree was based upon the agreement of the parties and did not result from an adjudication of that question by the court upon conflicting proof. It is difficult to perceive how the property rights thus established in plaintiff's favor could be wiped out by the subsequent decree of divorce obtained in a sister state by one of the parties to the agreement without the presence of or appearance by the other therein.

Assuming, for the purpose of this discussion only, that the provisions of the stipulations referred to, so as far as

adopted in the findings of this court, merged in its decree, it does not necessarily follow that the divorce obtained by [fol. 138] the husband in Nevada, jurisdictionally efficacious to dissolve the marital status of the parties, has extra-territorial effect upon the provisions for the maintenance and support contained in the pre-existing separation decree of this court, which is entitled equally with the decree of the State of Nevada to the protection of the full faith and credit clause of the federal constitution. This court acquired and retains jurisdiction in personam over the husband as an incident to the judgment of separation which it rendered upon the appearance of both parties therein. The State of New York had and continues to have an interest in the abandoned wife in whose favor its courts have rendered judgment, who continues to reside within its borders, and who may become a public charge should the defendant be freed of his obligation to support her. Under these circumstances, this court is not powerless and refuses to strike from its decree the provisions for the support of the plaintiff.

Mr. Justice Douglas, who wrote the prevailing opinion in the first Williams case, handed down a concurring opinion in *Esenwein v. Commonwealth of Pennsylvania ex rel. Esenwein* (325 U. S., 279, 65 Sup. Court, 1118) which was decided the same day on which the second Williams case was decided. He there pointed out that it was important to keep in mind the basic difference between the problem of marital capacity and the problem of support and that the first Williams case involved marital capacity. He then had this to say: " * * * Quite different considerations would have been presented if North Carolina had [fol. 139] merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse — whom the decree of divorce is obtained appears or is personally served. See *Yarborough v. Yarborough*, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924; *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518. But I am not convinced that in absence of

an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. (See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.) The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. See *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 447, 64 S. Ct. 208, 217, 88 L. ed. 149, 150 A. L. R. 413 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two states. See *Williams v. North Carolina*, *supra*. One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The state where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is [fol 140] required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all. See *Radin, The Authenticated Full Faith and Credit Clause*, 39 Ill. L. Rev. 1, 28." Mr. Justice Black joined in this opinion. Mr. Justice Rutledge, concurring, stated in part: " * * * In doing so, however, it is appropriate to indicate my agreement with the views expressed in the concurring opinion of Mr. Justice Douglas that the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect."

It follows that the defendant's motion to modify the decree of separation rendered by this Court so as to eliminate the provisions therein for the plaintiff's support is denied. The motion of the plaintiff for leave to enter a judgment for the arrears of alimony to date, with interest, is granted as prayed for.

Section 1172-d of the Civil Practice Act empowers this Court to require in its discretion "the husband to pay the wife's expenses in bringing, carrying on or defending * * *" any action or proceeding "to compel the payment of any sum of money required to be paid by a judgment

or order entered in an action for divorce, separation, [fol. 141] annulment or declaration of nullity of a void marriage * * *." Specifically included in said subdivision is a proceeding, pursuant to Section 1171-b of the Civil Practice Act, which is the section pursuant to which the plaintiff moves for leave to enter judgment. Under the provisions of this statute, the Court allows the plaintiff a counsel fee, in connection with these proceedings, in the sum of \$250. Proceed on notice.

[fol. 142] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of proper and correct copies of the notice of appeal, the order and judgment appealed from and all the papers upon which the Court below acted in making the order and judgment appealed from, and the whole thereof now on file in the office of the Clerk of the Supreme Court, Queens County. Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, September —, 1946.

Wing & Wing, Attorneys for Defendant-Appellant-Respondent. Roy Guthman, Attorney for Plaintiff-Respondent-Appellant.

[fol. 143] IN SUPREME COURT OF NEW YORK, COUNTY OF QUEENS

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

NOTICE OF APPEAL

SIRS:

Please Take Notice that the defendant hereby appeals to the Court of Appeals of the State of New York from a Judgment entered herein in the office of the Clerk of the County of Queens on the 20th day of November, 1946, in favor of the plaintiff and against the defendant, affirming upon an order of the Appellate Division of the Supreme

Court, Second Department, a Judgment heretofore entered herein in favor of the plaintiff and against the defendant on the 12th day of August, 1946, in the sum of \$2,441.90, and also for the sum of \$61.34 costs, and that [fol. 144] the defendant appeals from each and every part of said judgment.

Dated: New York, N. Y., January 17, 1947.

Yours, etc., Wing & Wing, Attorneys for Defendant,
Office & P. O. Address, 225 Broadway, Borough
of Manhattan, City of New York.

To: Roy Guthman, Esq., Attorney for Plaintiff, Office
& P. O. Address, 11 West 42nd Street, Borough of Man-
hattan, City of New York. County Clerk of Queens County.
[fol. 145] At a Term of the Appellate Division of the
Supreme Court of the State of New York held in and for
the Second Judicial Department at the Borough of Brook-
lyn, on the 12th day of November, 1946.

Present: Hon. Harry E. Lewis, Presiding Justice; Hon.
William F. Hagarty, Hon. William B. Carswell, Hon. Ray-
mond E. Aldrich, Hon. Gerald Nolan, Justices.

Order on Appeals from Resettled Order and Judgment
(One Paper)

GERTRUDE ESTIN, Respondent-Appellant,

vs.

JOSEPH ESTIN, Appellant-Respondent

ORDER OF AFFIRMANCE

The above-named Joseph Estin, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a resettled order and judgment (one paper) of the Supreme Court dated and entered in the office of the Clerk of the County of Queens the 12th day of August, 1946, granting plaintiff's motion for judgment for arrears of alimony directed to be paid to her under a judgment of separation dated October 11, 1943, and denying [fol. 146] defendant's cross motion to modify said judgment of separation, etc., and the above named Gertrude Estin, the plaintiff, having also appealed from said resettled order and judgment (one paper), insofar as same

determines that the local court in Nevada had jurisdiction to grant the defendant a divorce from plaintiff on May 24th, 1944, etc., herein, and the said appeals having been argued by Mr. James G. Purdy of Counsel for appellant-respondent, and argued by Mr. Roy Guthman of Counsel for respondent-appellant, and due deliberation having been had thereon:

It is Ordered and Adjudged that the resettled order and judgment (one paper), so appealed from, be and the same hereby is unanimously affirmed, with \$10 costs and disbursements to plaintiff.

Enter:

John J. Callahan, Clerk.

[fol. 147] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

M712—1943

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

JUDGMENT OF AFFIRMANCE

An appeal having been taken to the Appellate Division of the Supreme Court for the Second Judicial Department from a Judgment and resettled Order of the Supreme Court, Queens County, entered in the office of the Clerk of Queens County on the 12th day of August 1946 in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and said appeal having been heard and the said Appellate Division having by an order entered in the office of the Clerk of said Appellate Division on the 12th day of November unanimously affirmed said judgment with \$10.00 costs of said appeal and the disbursements to the plaintiff and the record on said appeal together with a certified copy of said order having been remitted to the office of the Clerk of the County of Queens, and the costs and disbursements having been duly taxed in the sum of \$61.34, it is on motion of Roy Guthman, Esq., attorney for the plaintiff

Adjudged that the judgment and re-settled Order of this court entered on the 12th day of August 1946 be and the

[fol. 148] same hereby is affirmed with \$10.00 costs and disbursements and it is further

Adjudged that the plaintiff, Gertrude Estin, do recover of the defendant, Joseph Estin, the sum of \$10.00 costs and \$51.34 disbursements, a total of \$61.34, as taxed, and that the plaintiff have execution therefor.

Dated, Jamaica, N. Y., November 20, 1946.

Paul Livoti, Clerk.

[fol. 149] IN COURT OF APPEALS OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the sixteenth day of January A. D. 1947.

Present: Hon. John T. Loughran, Chief Judge, presiding.

GERTRUDE ESTIN, Respondent,

vs.

JOSEPH ESTIN, Appellant

ORDER DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF
APPEALS

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that an appeal lies as of right upon a constitutional question.

(See Section 588, subd. 1-a, Civil Practice Act.)

A Copy

Raymond J. Cannon, Deputy Clerk.

[fol. 150] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

James G. Purdy, being duly sworn, deposes and says: I am a member of the firm of Wing & Wing, the attorneys for the defendant-appellant in this action and am familiar with all the proceedings herein.

No opinion was rendered by the Appellate Division of the Supreme Court, Second Department, on affirming the judgment appealed from herein.

James G. Purdy.

Sworn to before me this 28th day of January, 1947.
Gwendolyn Purdy, Notary Public, State of New York. Residing when appointed in Westchester County. Cert. filed in N. Y. Co. Clk.'s No. 489, Reg. No. 277-P-7. Commission expires March 30, 1947.

[fol. 151] STIPULATION WAIVING CERTIFICATION OF RECORD
TO THE COURT OF APPEALS

It Is Hereby Stipulated that the foregoing are true copies of the Judgment Roll and Record on Appeal to the Appellate Division of the Supreme Court, the Order of Affirmance, the Judgment of Affirmance, and the Notice of Appeal therefrom, all of which are now on file with the Clerk of the County of Queens and certification thereof is hereby waived.

Dated: New York, N. Y., January 28th, 1947.

Roy Guthman, Attorney for Plaintiff-Respondent.
Wing & Wing, Attorneys for Defendant-Appellant.

[fol. 151-A] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of April, in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

GERTRUDE ESTIN, Respondent,
against

JOSEPH ESTIN, Appellant

REMITTITUR—April 18, 1947

Be it Remembered. That on the 5th day of February in the year of our Lord one thousand nine hundred and Forty-seven, Joseph Estin, the appellant in this cause, came here unto the Court of Appeals, by Wing & Wing, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Gertrude Estin, the respondent in said cause, afterwards appeared in said Court of Appeals, by Roy Guthman, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 151-B] Whereupon, The said Court of Appeals having heard this cause argued by Mr. James G. Purdy of counsel for the appellant, and by Mr. Roy Guthman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals

aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 18, 1947.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 151-C] IN COURT OF APPEALS OF NEW YORK

GERTRUDE ESTIN, Respondent,

v.

JOSEPH ESTIN, Appellant

OPINION—Decided April 18, 1947

LOUGHRAN, *Ch. J.* The parties were married in 1937, and thereupon took up their home in this State where they lived together until April, 1942, when the husband left the wife. In February, 1943, she brought against him in the New York Supreme Court this action for a separation. (See Civ. Prac. Act, art. 69.) He entered a general appearance but offered nothing in the way of denial or defense. Upon a finding that he had abandoned her in April, 1942, a judgment of separation was granted to her in October, 1943, and thereby she was awarded permanent alimony of \$180 per month—an amount that had been recommended in a stipulation filed with the court by the respective counsel for both parties. There was no issue of the marriage.

In January, 1944, the husband went to the State of Nevada where in April, 1945, he instituted an action against the wife for an absolute divorce. The summons and complaint therein were delivered to her in this State where she

remained domiciled. After she had failed to respond to that constructive service, and in May, 1945, a final decree of divorce—without any award of alimony—was granted to the husband by the Nevada court, “on the ground of three years continual separation, without cohabitation.”

Up to that time, payments of alimony had been made by the husband pursuant to the prior New York judgment of separation. Upon the recording of his Nevada decree, however, he stopped such payments, with the result that in February, 1946, the wife sought an order directing entry in this action of a supplementary judgment “for the amount of such arrears.” (See Civ. Prac. Act, § 1171-b.) In opposing that application, the husband, invoking the full faith and credit clause of the Constitution of the United States (art. IV, § 1), demanded (1) a declaration of the unqualified superiority of his Nevada divorce decree over the prior New York judgment of separation, and (2) an order eliminating the support provisions of that prior judgment as of May 24, 1945, the date of the Nevada decree.

At Special Term the motion made by the wife was granted, the cross motion made by the husband was denied, and accordingly judgment in her favor was directed against him for arrears of alimony amounting to \$2,340. An affirmance by the Appellate Division followed. The husband then applied to this court for leave to bring the determination [fol. 151-E] of the Appellate Division here for review; leave was denied as unnecessary, since the award of arrears of alimony to the wife was in effect a new final judgment and the construction of the full faith and credit clause was directly involved (see 296 N. Y. 828); so the case is now before us on an appeal which the husband has taken as of right from the affirmance of the Appellate Division. (See Civ. Prac. Act, § 588, subd. 1, par. a.)

Special Term found that “the defendant is now and since January, 1944, has been a bona fide resident of the State of Nevada”. The proof upon which this finding rests is ample. Hence we are concluded by the affirmance thereof. Hence, too, there is no denying the jurisdictional validity of the Nevada divorce decree, because the domicile of one spouse within a State gives power to that State to dissolve a marriage wheresoever contracted (*Williams v. North Carolina*, 325 U. S. 226, 229-230). Although in this New York separation action, the husband was adjudged to have been solely to blame when he abandoned the wife in April,

1942, yet the Nevada Court was not thereby disabled from granting him an absolute divorce in May, 1945, upon the ground of his having then lived apart from the wife for a period of three years, without cohabitation. For the Nevada statutes authorize the granting of a divorce upon that ground no matter where the fault may lie (Nevada Compiled Laws, § 9467.06), and it is not for us to inquire into the merits of such an exercise of State power. (*Williams v. North Carolina*, 317 U. S. 287, 300-301; 325 U. S. 226.)

We have then this situation: The full faith and credit clause commands us to accord recognition to so much of the Nevada decree as pronounced the dissolution of the marriage; and the only remaining question is whether the Nevada decree must also be taken to have cancelled the alimony provision made for the wife through the prior judgment in this New York separation action.

A divorce decree (whether foreign or domestic) granted by a court having jurisdiction of the persons of both parties may very well be held to override any incongruous alimony provision of an earlier domestic judgment of separation. (See *Scheinwald v. Scheinwald*, 231 App. Div. 757; *Richards v. Richards*, 87 Misc. 134, affd. 167 App. Div. 922; *Holmes v. Holmes*, 155 F. 2d 737.) But the *res judicata* principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted the last judgment was without jurisdiction of the person of the defendant (cf. *Miller v. Miller*, 200 Iowa 1193; *Wagster v. Wagster*, 193 Arkansas 902; 2 Freeman on Judgments [5th ed.], § 629). For like reasons of estoppel, a wife who procures a foreign divorce decree may in that way perhaps relieve her husband from any further obligation to support her. *Harris v. Harris* (197 App. Div. 646) was a case of that kind; it does not reach the issue now before us. (See *Krause v. Krause*, 282 N. Y. 355.)

Nor is that issue ruled by *Esenwein v. Commonwealth ex rel. Esenwein* (325 U. S. 279), as we see it. In the *Esenwein* case, a husband, relying upon a Nevada divorce decree, applied to a Pennsylvania court for revocation of a prior Pennsylvania order for the support of his wife. According to Pennsylvania law, such a support order did not survive divorce. With that rule of the local law as a premise, the Supreme Court of the United States said: "The Full Faith and Credit Clause placed the Pennsylvania Courts under a

duty to accord *prima facie* validity to the Nevada decree. * * * The Pennsylvania Supreme Court rightly indicated [fol. 151-G] that if merely the Nevada decree had been in evidence, it was entitled to carry the day." (325 U. S. at pp. 280-281.) Hence in the *Esenwein* case, as the court said, the efficacy of the Nevada divorce in Pennsylvania was the decisive question.

On the other hand, *Barber v. Barber* (21 How. [U. S.] 582) is here an authority much in point, as we believe. In that case, a wife was granted a judgment of separation by the Court of Chancery of this State where both parties were domiciled at the time. The judgment directed payment of alimony in quarterly installments. Without making any payment thereof, the husband went to Wisconsin where he procured an absolute divorce. Thereafter the wife had judgment for the unpaid alimony in a suit brought by her in the District Court of the United States for the District of Wisconsin. On appeal by the husband, the Supreme Court of the United States rejected his claim that his Wisconsin divorce decree had extinguished his liability for alimony under the New York judgment of separation. The court said: "It is not necessary for us to pass any opinion upon the legality of the [Wisconsin divorce] decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

[fol. 151-H] The ruling so laid down by the highest court in the land is akin to decisions of our own. In *Livingston v. Livingston* (173 N. Y. 377), we held that alimony unconditionally and finally owing to a wife under a matrimonial decree is a vested property right of which she may not be deprived even by way of an act of the Legislature; and in *Jackson v. Jackson* (290 N. Y. 512), we held that a court which lacked jurisdiction over the person of a husband was powerless to set aside a separation agreement in an action brought against him by his wife. Counsel have cited no Nevada statute or decision to the contrary nor any

Nevada case in which a divorce granted in that State against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the State of her domicile. Consequently, as we shall assume, the common law of Nevada does not differ in that regard from the common law of New York. (See *Read v. Lehigh Valley R. R. Co.*, 284 N. Y. 435, 441-442; Restatement, Conflict of Laws, § 622). On that basis and in the light of *Barber v. Barber* (*supra*) we conclude that the full faith and credit clause affords no reason for disapproval by us of the decision reached herein by the courts below.

The judgment should be affirmed, with costs.

LEWIS, CONWAY, DESMOND, THATCHER, DYE and FULD, JJ.,
concur.

Judgment affirmed.

[fol. 152] At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Queens at the General Court House of Queens County on Sutphin Boulevard, in Jamaica, New York, on the 14th day of May, 1947,

Present: Hon. Francis G. Hooley, Justice.

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

ORDER MAKING THE JUDGMENT OF THE COURT OF APPEALS THE
JUDGMENT OF THE NEW YORK SUPREME COURT, QUEENS
COUNTY

The above-named defendant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered on the Order of the Appellate Division of the Supreme Court, Second Department, in the Office of the Clerk of the County of Queens on the 20th day of November, 1946, affirming the judgment in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and granting to the plaintiff-respondent judgment for \$61.34, costs and disbursements in the Appellate Division, and from each and every part of said judgment of affirmance and order of affirmance and

from said judgment for costs and disbursements, as well as from the whole thereof; and the said appeal having been [fol. 153] duly argued at the said Court of Appeals and after due deliberation the Court of Appeals, having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed and judgment entered for the plaintiff with costs and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law:

Now on reading and filing the remittitur from the said Court of Appeals herein, and on the notice of motion with proof of due service thereof, and upon motion of Roy Guthman, attorney for the plaintiff herein, it is hereby,

Ordered that the order and judgment of the said Court of Appeals be and the same are hereby made the order and judgment of this Court.

Enter

Francis G. Hooley, J. S. C.

J. W. N. S.

Granted May 14th, 1947.

Paul Livoti, Clerk.

[fol. 154] IN SUPREME COURT OF NEW YORK, QUEENS COUNTY

GERTRUDE ESTIN, Plaintiff,

against

JOSEPH ESTIN, Defendant

JUDGMENT

The above named defendant having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the Office of the Clerk of the County of Queens on the 20th day of November, 1946, affirming the judgment in favor of the plaintiff and against the defendant heretofore entered in the office of the said clerk on the 12th day of August, 1946, in favor of the plaintiff and against the defendant in the sum of \$2,441.90 and granting to the plaintiff costs and disbursements in the Appellate Division in the sum of \$61.34 which

was entered herein in the office of the Clerk of Queens County on the 20th day of November, 1946, and from each and every part of said Judgment *of said judgment* of affirmance and order of affirmance as well as from the whole thereof; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged [fol. 155] that the said judgment so appealed from as aforesaid be affirmed and judgment rendered for the plaintiff with costs and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court, there to be proceeded on according to law; and the remittitur from said Court of Appeals having been duly filed herein and the Order, having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of Roy Guthman, Esq., attorney for the plaintiff herein, it is hereby

Adjudged that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court, and it is further

Adjudged that the judgment entered herein on August 12th, 1946, be and the same is hereby affirmed and it is hereby

Adjudged that the judgment and order of the Appellate Division entered herein on the 20th day of November, 1946, for \$61.34 be and the same is hereby affirmed and it is further

Adjudged that the plaintiff Gertrude Estin recover of the defendant, Joseph Estin, the sum of \$93.10, the amount of her costs in the Court of Appeals, as taxed, and that she have execution therefor.

[fol. 156] Judgment signed and entered herein this 15th day of May, 1947, at 11:55 A. M.

Paul Livoti, Clerk.

Gertrude Estin, 353 W. 57th Street, c/o Henry Hudson Hotel, Borough of Manhattan, New York City.

Joseph Estin, c/o Hotel Wyn, Reno, Nevada.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 157] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

ORDER ALLOWING CERTIORARI—December 15, 1947

A motion for leave to file a petition for rehearing and petition for rehearing having been submitted in this case:

Upon consideration thereof, it is ordered by this Court that the motion for leave to file and petition for rehearing be, and they are hereby, granted.

It is further ordered that the order entered October 13, 1947, denying the petition for certiorari be, and it is hereby, vacated; and that the petition for writ of certiorari herein be, and it is hereby, granted. The case is consolidated for argument with Kreiger vs. Kreiger, No. 371, and a total of three hours is allowed for oral argument of the consolidated cases.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,367. New York Court of Appeals. Term No. 139. Joseph Estin, Petitioner, vs. Gertrude Estin. Petition for a writ of certiorari and exhibit thereto. Filed June 18, 1947. Term No. 139 O. T. 1947.

